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In the Supreme Court of the United States

OCTOBER TERM, 1991

ITEL CONTAINERS INTERNATIONAL CORPORATION,
PETITIONER

v.

JOE HUDDLESTON, COMMISSIONER OF REVENUE,
STATE OF TENNESSEE, RESPONDENT

Petition for a Writ of Certiorari to the Tennessee Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

PHILIP W. COLLIER
Counsel of Record
JAMES C. SEIFFERT
T. MORGAN WARD, JR.
Stites & Harbison
600 West Main Street
Louisville, KY 40202
(502) 587-3400

ANDREW L. FREY
CHARLES ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Foreign Commerce Clause precludes the imposition of a state sales tax on the lease of instruments of international traffic that enter the United States under Customs bond and are used exclusively in foreign commerce.

2. Whether the imposition of such a tax is preempted by the Customs Conventions on Containers.

3. Whether the Import-Export Clause precludes the imposition of a state sales tax on imported or exported goods while they are in transit.

RULE 29.1 STATEMENT

Petitioner Itel Containers International Corporation is a wholly owned subsidiary of Itel Corporation. Itel Containers International Corporation has two partially-owned subsidiaries, SSI Containers, Ltd., and Itel Containers International, SRL.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	8
I. APPLICATION OF A STATE SALES TAX TO INSTRUMENTALITIES OF FOREIGN COMMERCE IS INCONSISTENT WITH THE FOREIGN COMMERCE CLAUSE	9
II. A STATE SALES TAX ON CONTAINERS USED EXCLUSIVELY IN FOREIGN COMMERCE VIOLATES THE CONTAINER CONVENTIONS	17
III. A STATE TAX ON GOODS THAT ARE MOVING IN FOREIGN COMMERCE VIOLATES THE IMPORT-EXPORT CLAUSE	23
CONCLUSION	28

TABLE OF AUTHORITIES

CASES: Page

Beare Co. v. Olsen, 711 S.W.2d 603 (Tenn. 1986) 6, 16
Complete Auto Transit Inc. v. Brady, 430 U.S. 274 (1977) 10
Container Corp. v. Franchise Tax Board, 463 U.S. 159 (1983) 10, 12, 13, 17
Department of Revenue v. Ass'n of Washington Stevedoring Cos., 435 U.S. 734 (1978) 7, 9, 23, 24, 26, 27
Henneford v. Silas Mason Co., 300 U.S. 577 (1937) 13
Hines v. Davidowitz, 312 U.S. 52 (1941) 17
Hooten v. Carson, 209 S.W.2d 273 (Tenn. 1948) 14
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) .... *passim*
Louisiana Land & Exploration Co. v. Pilot Petroleum Corp., 900 F.2d 816 (5th Cir. 1990), cert. denied, 111 S. Ct. 248 (1990) 9, 23, 25
Low v. Austin, 80 U.S. (13 Wall.) 29 (1872) 23
McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940) 7, 17, 20, 21
Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) 7, 23, 24, 27
Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980) 11
National Life & Accident Ins. Co. v. Keaton, 1986 Westlaw 4846 (Tenn. App.) 26
R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130 (1986) 15, 16, 20, 22, 24
Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946) 7, 9, 23
Sam Carey Lumber Co. v. Sixty-One Cabinet Shop, Inc., 773 S.W.2d 252 (Tenn. App. 1989) 14
Sears Roebuck & Co. v. County of Los Angeles, 449 U.S. 1119 (1981) 16
South Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984) 9
Star-Kist Foods, Inc. v. Los Angeles, 719 P.2d 987 (Cal. 1986), cert. denied, 480 U.S. 930 (1987) 17

TABLE OF AUTHORITIES—Continued

Page

Wardair Canada, Inc. v. Dept. of Revenue, 477 U.S. 1 (1986) 11, 12, 20
Williams v. Vermont, 472 U.S. 14 (1985) 13
Xerox Corp. v. Harris County, 459 U.S. 145 (1982) 7, 15, 17, 20, 21, 22

UNITED STATES CONSTITUTION:

Commerce Clause, Art. I, § 8, Cl. 3 .... *passim*
Supremacy Clause, Art. VI, Cl. 2 .... *passim*
Import-Export Clause, Art. I, § 10, Cl. 3 .... 22, 23, 24, 25, 26, 27

TREATIES OF THE UNITED STATES:

Customs Convention on Containers, May 18, 1956, [1969] 20 U.S.T. 301 .... 2, 3, 8, 14, 17
Customs Convention on Containers, December 2, 1972, [1985] 988 U.N.T.S. 43 .... 2, 3, 8, 19, 22
International Convention for Safe Containers, December 2, 1972, [1979] 39 U.S.T. 3707 19

FEDERAL STATUTES:

19 U.S.C. 1322(a) 2, 4, 18, 22
28 U.S.C. 1257(a) 1

FEDERAL REGULATIONS:

19 C.F.R. 10.41a 2, 4, 5, 18
19 C.F.R. pt. 19 22
19 C.F.R. 113.66 .... 5, 22
19 C.F.R. pt. 115 .... 2, 5, 22
19 C.F.R. pt. 123 4

TENNESSEE STATUTES:

Tenn. Code Ann. 67-6-102(23)(A) (1989) 2, 4, 6
Tenn. Code Ann. 67-6-313 (1989) 13
Tenn. Code Ann. 67-6-502 (1971) 6, 14
Tenn. Code Ann. 67-6-507 (1990) 13

MISCELLANEOUS:

Bureau of the Census SM705 3

TABLE OF AUTHORITIES—Continued

	Page
International Institute of Container Lessors as *Amicus Curiae*	3
I J. Hellerstein, *State Taxation* (1983)	27
McCray, *Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaluation*, 17 Urb. Law. 529 (1985)	13
O.J. Eur. Comm. (No. L 145) 1 (1977) (Sixth Directive, 77/388)	14
Simon, *The Law of Shipping Containers*, 5 J. Mar. L. & Com. 507 (1974)	3
Treasury Department's Model Income Tax Treaty of June 16, 1981, Tax Treaties (CCH) ¶ 211, at 10,576 (1990)	19
United Nations Doc. E.CONF. 59/2 (Feb. 22, 1971)	18
United Nations Doc. E.CONF. 59/16 (Nov. 26, 1971)	19
U.S. Br. in support of prob. jur., No. 84-902	13
U.S. Br. as Amicus Curiae, No. 77-1378	19, 27

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OPINIONS BELOW

The opinion of the Supreme Court of Tennessee (App. *infra*, 1a-18a) is designated for publication but has not yet been published. The opinion of the Tennessee Court of Chancery (App., *infra*, 19a-26a) is not reported.

JURISDICTION

The judgment of the Tennessee Supreme Court was entered on April 22, 1991. On July 10, 1991, Justice Stevens extended the time within which to file the petition to and including August 21, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant portions of the following constitutional, statutory, and regulatory provisions are reproduced in the appendix to the petition at 38a-44a: the Commerce Clause (Art. I, § 8, Cl. 3), the Import-Export Clause (Art. I, § 10, Cl. 2) and the Supremacy Clause (Art. VI, Cl. 2) of the United States Constitution; the Customs Convention on Containers, Dec. 2, 1972, 988 U.N.T.S. 43; the Customs Convention on Containers, May 18, 1956, [1969] 20 U.S.T. 301; 19 U.S.C. 1322(a); 19 C.F.R. 10.41a(1)(a); 19 C.F.R. 115.1; and Tenn. Code Ann. 67-6-102 (1989).

STATEMENT

This case involves a challenge to the imposition of Tennessee's sales tax on the lease of cargo containers used exclusively in foreign commerce; the tax was upheld by Tennessee courts against an attack grounded on the United States Constitution. The containers subject to tax were Customs bonded and sealed instruments of international traffic prohibited from use in domestic commerce. Most lessees of the containers, who in large part absorb the tax, are foreign domiciliaries. The exaction of the tax therefore both imposes an unwarranted burden on goods exported from and imported to the United States, and threatens to prompt retaliation by our trading partners against American firms. Because the decision below is inconsistent with holdings of this Court—and because the Tennessee tax places the United States in violation of its international treaty obligations—further review is warranted.

The Container Industry. Cargo containers are specially manufactured steel boxes, typically eight feet high, eight to 9.5 feet wide, and between eight and 40 feet long, that are used as articles of transport equipment. See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 436 n.1 (1979). Because they are reusable, may be

loaded and unloaded mechanically, and are designed to be carried by truck, rail, and oceangoing vessel, containers have greatly reduced the cost of shipping cargo. See Simon, *The Law of Shipping Containers*, 5 J. Mar. L. & Com. 507, 513 (1974). Their use in recent decades is often described as having revolutionized the transport of goods (see *id.* at 507), and containers now provide the principal means for marine transportation of imported and exported goods. Containers accounted for 60% of the value of American marine imports and 52% of the value of American marine exports in 1990. Bureau of the Census SM705. The value of American goods exported by container in 1990 exceeded $84 billion. *Ibid.* Containers were utilized for the marine transport of a variety of crucial American exports in 1990: 59% of the value of exported chemicals and related products, 61% of the value of exported machinery and transport equipment, 69% of the value of manufactured goods and 89% of the value of exported beverages and tobacco. *Ibid.* Some 25% of these containers, with a market value of approximately $2.5 billion, are owned by firms domiciled in the United States. Br. of International Institute of Container Lessors as *Amicus Curiae* before the Tenn. Sup. Ct. at 2.

The Customs Conventions. The use of containers in foreign commerce is promoted and regulated by the 1972 Customs Convention on Containers (the "1972 Convention"), 988 U.N.T.S. 43, acceded to by the United States in 1985, and the 1956 Customs Convention on Containers (the "1956 Convention"), May 18, 1963, [1969] 20 U.S.T. 301.[1] The chief device for promoting international shipment of goods by container is the fiction of "temporary admission": the Conventions prevent containers from entering the domestic commerce of any signatory nation.

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[1] The 1972 Convention replaces the 1956 Convention in dealings between signatories to the 1972 Convention.

The 1972 Convention obligates signatory nations to admit containers "free of import duties and taxes and free of import prohibitions and restrictions" (Arts. 1(b), 3, 988 U.N.T.S. 44-45). The term "import duties and taxes" is broadly defined to "mean Customs duties *and all other duties, taxes, fees and other charges* which are collected on, or in connection with, the importation of goods, but not including fees and charges limited in amount to the approximate cost of services rendered." Art. 1(a), *id.* at 44 (emphasis supplied). The 1972 Convention requires strict regulatory compliance to qualify for these benefits.[2]

The Conventions have been implemented in the United States by statute and regulation. The Secretary of the Treasury, acting pursuant to 19 U.S.C. 1322(a), has designated containers as "instruments of international traffic" that are excepted from application of the Customs laws. 19 C.F.R. 10.41a(a)(1), (3).[3] To receive this special treatment, however, a container owner must provide assurances that its containers will not be used in interstate or intrastate commerce; if the containers are diverted to point-to-point local use within the United States, the owner must make entry and pay the applicable Customs duty. Each owner must post a continuous bond with the Customs Service to secure compliance with this under-

[2] The 1972 Convention limits the use of containers in domestic traffic (art. 9, *id.* at 46; Annex 3, *id.* at 52) and provides for the admission of container parts and accessories (art. 10-11, *id.* at 46), the approval of containers used to transport goods under Customs seal (art. 12, *id.* at 47; Annex 5, *id.* at 61-67), the making of containers (Annex 1, *id.* at 51-52), the obligations of container owners (Annex 2, *id.* at 52), and the design of containers (Annex 4, *id.* at 52-61).

[3] Containers are one of many articles that have been designated as instruments of international traffic by the Customs Service, including skids, pallets, cores for textile fabrics and other permanent items used to facilitate international transport. The Secretary of the Treasury has similarly excepted locomotives, buses, trucks and taxicabs that are used solely in foreign commerce from entry or the payment of duties. 19 C.F.R. pt. 123.

taking. 19 C.F.R. 10.41a(a), (c), 113.66. In addition, 19 C.F.R. pt. 115 implements the 1972 Convention's procedures for the certification and approval of containers used in transporting goods under Customs seal. Compliance with the procedures allows steamship lines to move containers from the point of loading to the ultimate destination without the presentation of papers to or inspection by Customs officials.

Itel's Business. Itel is a Delaware corporation with its principal place of business in California. During the relevant period, it leased cargo containers that were used exclusively in foreign commerce. The containers were manufactured and purchased abroad by Itel, and entered the United States certified for the transport of goods under Customs seal. Itel posted a continuous bond with the Customs Service undertaking not to withdraw its containers from foreign commerce. All of Itel's leases accordingly restricted use of the containers to international commerce. App., *infra*, 2a. The leases were solicited and negotiated through marketing offices in California, Texas, Illinois, New Jersey, South Carolina and Washington. In addition, Itel operated container terminals and made use of so-called "third-party" terminals—facilities operated by independent contractors that tendered delivery and accepted returns of containers—worldwide. Itel allowed its lessees to accept delivery of and return containers at the terminals. *Id.* at 31a.

Itel operated one terminal and used several third party terminals in Tennessee. Containers were delivered at those points to common carriers hired by Itel's lessees, who initially used the containers to export goods from the United States. None of the leases during the relevant period, however, was solicited, negotiated, or executed in Tennessee. App., 2a-3a, 30a-33a. Most of the lessees who accepted delivery of containers in Tennessee were international steamship lines domiciled in foreign countries, including companies domiciled in Australia, Colombia, France, Germany, Iceland, Israel, New Zealand, Norway,

Singapore, Sweden, Switzerland, the United Kingdom, and Venezuela. Trial Tr. 31-33. While each container initially was used to export American goods to foreign ports, most containers were used continuously in multiple import-export shipments. All of Itel's leases culminated with an import shipment terminating in a Customs Convention signatory nation; 61% of the leases concluded with the importation of goods into the United States. Itel Trial Ex. 3, 7, 13.

The Assessment. In 1986, the Tennessee Department of Revenue assessed Itel $348,571 in back sales taxes, penalties and interest on the proceeds earned from the lease [4] of containers that Itel delivered in Tennessee to international carriers.[5] While Itel is obligated to collect the tax from its lessees "insofar as it can be done" (Tenn. Code Ann. 67-6-502 (1971)), the legal incidence of the tax falls on Itel, and only Itel may contest its imposition. See *Beare Co. v. Olsen*, 711 S.W.2d 603, 605 (Tenn. 1986). Itel accordingly paid the tax under protest and began this action for a refund, challenging the constitutionality of the tax under the Commerce, Import-Export, and Supremacy Clauses of the United States Constitution. The Tennessee Chancery Court rejected the claim. App., *infra*, 19a-26a.[6]

The State Court Opinion. The Tennessee Supreme Court affirmed. App., *infra*, 1a-18a. It recognized this Court's holding in *Japan Line* that a state ad valorem property tax on containers owned by foreign domiciliaries violates the Foreign Commerce Clause. The court also

[4] Tennessee's 5.5% sales tax is imposed on "any transfer of title or possession, or both, exchange, barter, lease or rental * * * for a consideration." Tenn. Code Ann. 67-6-102(23)(A) (1989).

[5] Petitioner already was paying sales and use taxes on fees collected in connection with repair services performed at its Memphis terminal. Those taxes are not at issue here. See App., *infra*, 2a-3a.

[6] The court reduced the assessment by $224,453 on other grounds, however. The State did not appeal the reduction.

acknowledged that "Itel's containers, like Japan Line's containers, are instrumentalities of foreign commerce" (*id.* at 7a), and it expressly declined to distinguish *Japan Line* on the ground that in this case the tax happens to fall on a domestic domiciliary. *Id.* at 7a-8a. Instead, the court found a constitutional distinction between sales and property taxes (see *id.* at 12a), holding that state sales taxes by their very nature satisfy the requirements of the Foreign Commerce Clause because they pose no risk of multiple taxation (*id.* at 14a-15a) and cannot interfere with the federal government's management of foreign relations or international trade. *Id.* at 15a-16a.

The court next held that the Tennessee tax was not preempted by the Container Conventions and the Treasury Department's implementing regulations. It distinguished this Court's decisions in *Xerox Corp. v. Harris County*, 459 U.S. 145 (1982), and *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940) (holding that state property and sales taxes are preempted by federal statutes that exempt goods from Customs duties when they are stored under bond in designated warehouses), finding that federal regulation of Customs bonded containers is "less pervasive" than the regulation of Customs bonded warehouses. App., *infra*, 14a. The court also reasoned that preemption is inappropriate because the Container Conventions were not intended to benefit container owners. *Id.* at 10a.

Finally, the court turned aside Itel's claim under the Import-Export Clause. In rejecting the argument that the Tennessee tax is invalid under *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946), the court below evidently concluded that *Richfield's* holding did not survive this Court's more recent decisions in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), and *Department of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). See App., *infra*,

16a-17a. And in applying the Import-Export Clause test set out in *Michelin*, the court again found it dispositive that the tax at issue here is one on sales rather than on property. *Id.* at 18a.

REASONS FOR GRANTING THE PETITION

This case presents issues of considerable importance to the foreign relations and import/export trade of the United States. The United States and 52 other nations, as signatories to the Customs Conventions on Containers, have pledged to erase international borders for purposes of container transport. To this end, the Customs Conventions prohibit import duties or taxes except fees limited to the approximate cost of services rendered. The Conventions do not allow any other form of local taxation. Moreover, the custom of the signatory nations under the Conventions is to abstain from imposing transaction taxes upon sales or leases of containers. Because the Conventions reflect "a national policy to remove impediments to the use of containers as 'instruments of international traffic,'" Tennessee's imposition of sales tax "impair[s] federal uniformity in an area where federal uniformity is essential." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448, 453 (1979). Moreover, since Tennessee's sales taxes will be paid, in substantial part, by foreign steamship lines and container lessors, the decision below invites retaliation against domestic firms by our trading partners.

At the same time, the tax will both increase the cost of American exports and discourage the use of American containers, effects that will impose disproportionate burdens on American firms engaged in foreign commerce. Because more than $84 billion in American exports are carried in containers annually, the imposition of a "transit" fee on the transfer of containers will have a substantial impact on America's import and export trade. Further, approximately 25% of all containers, representing a market value of $2.5 billion, are owned by firms domiciled in the United States; state taxes on the transfer of these containers will put this crucial domestic industry at a significant competitive disadvantage.

Finally, this case presents recurring issues of considerable importance under the Foreign Commerce, Supremacy and Import-Export Clauses. The decision of the Tennessee Supreme Court disregards "sensitive matters of foreign relations and national sovereignty" recognized by the Court in *Japan Line*, 441 U.S. at 456, and conflicts directly with the Court's holding in *Richfield* and the Fifth Circuit's recent decision in *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir. 1990), cert. denied, 111 S. Ct. 248 (1990). In *Dept. of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 737 n.23 (1978), the Court explicitly reserved the Import-Export Clause issue present here. Further review accordingly is warranted.

I. APPLICATION OF A STATE SALES TAX TO INSTRUMENTALITIES OF FOREIGN COMMERCE IS INCONSISTENT WITH THE FOREIGN COMMERCE CLAUSE

Japan Line. In *Japan Line*, the leading case under the Foreign Commerce Clause, this Court invalidated a state ad valorem property tax on containers that were owned by foreign domiciliaries and used in foreign commerce. See 441 U.S. at 437. The Court observed that state taxes on foreign commerce, in contrast to parallel levies on interstate trade, pose both an "enhanced risk of multiple taxation" (*id.* at 446) and the prospect of "impair[ing] federal uniformity in an area where federal uniformity is essential." *Id.* at 448. See also *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 92 n.7 (1984). The Court accordingly held that an inquiry into the constitutionality of a state tax on foreign commerce has two parts:

> [A] court must * * * inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.' If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

Japan Line, 441 U.S. at 451.[7] The Court later explained that a state tax "will violate the 'one voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive." *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 194 (1983).

Like *Japan Line*, this case involves a state tax on containers whose movements in the taxing jurisdiction "are essential to, and inseparable from, the containers' efficient use as instrumentalities of foreign commerce." 441 U.S. at 437. In distinguishing *Japan Line*—which it recognized would otherwise be controlling—the court below grounded its decision entirely on the legal conclusion that a state sales tax "is distinguishable from a direct *ad valorem* property tax" for purposes of the Foreign Commerce Clause. App., *infra*, 12a. In going on to hold that a sales tax is exempt from the requirements of the Clause, the court explained that "the transfer of containers is a discrete transaction, occurring only in Tennessee, which creates no risk of multiple international taxation." *Id.* at 14a (footnote omitted). As for the other concerns identified in *Japan Line*, the court similarly reasoned that none "are implicated by a sales tax on a discrete transaction occurring only in one jurisdiction." *Id.* at 16a.

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[7] A state tax on foreign commerce also must satisfy the separate test established in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), for the analysis of burdens on interstate commerce. See *Japan Line*, 441 U.S. at 451. At this point, it is not disputed that the Tennessee tax passes the *Complete Auto* test.

Sales Taxes and the Foreign Commerce Clause. This issue—whether sales and similar transaction taxes are inherently immune from challenge under the Foreign Commerce Clause—is a recurring one of great practical importance. While the Court has addressed the application of the Clause to state property taxes (in *Japan Line*) and apportioned net income taxes (in *Container Corp.*; see also *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 448 (1980)), it has reserved the question as to sales taxes. Holding in *Wardair Canada, Inc. v. Dept. of Revenue*, 477 U.S. 1 (1986), that the federal government had affirmatively permitted application of the Florida sales tax to aviation fuel sold to foreign carriers (see 477 U.S. at 3-4, 9-10, 12), the Court expressly noted that "nothing in this opinion should be understood to address[] whether, in the absence of these international agreements . [permitting state taxation], the Foreign Commerce Clause would invalidate Florida's tax." *Id.* at 13. That sales tax issue, which may arise frequently, warrants the Court's attention and is fairly presented in this case. Sales and use taxes, currently imposed by 45 States, are ubiquitous; if the decision below is left standing, many States surely will follow Tennessee's lead and apply their local taxes to containers and other instrumentalities of foreign commerce. Cf. *Japan Line*, 441 U.S. at 453 & n.19. And as the examples of *Wardair* and this case make clear, Foreign Commerce Clause issues involving sales taxes may appear in a wide range of contexts. The Court should grant review to settle the constitutionality of such taxes.

That is especially so because the decision below cannot be reconciled with the principles set down by this Court. In *Wardair*, Justice Blackmun, the only Member of the Court to reach the constitutional issue, flatly rejected reasoning of the sort relied upon by the court below, finding that "[t]he tax imposed in this case by Florida on fuel is indistinguishable, for Commerce Clause purposes, from the tax imposed by California on containers

in *Japan Line*." 477 U.S. at 18 (Blackmun, J., dissenting). That was the case, Justice Blackmun explained, because "other countries may react to Florida's tax with various retaliatory measures against United States cariers abroad, retaliation that 'of necessity would be felt by the Nation as a whole.'" *Id.* at 20, quoting *Japan Line*, 441 U.S. at 45. Similarly, the United States, whose views are entitled to considerable deference in this area (see *Container Corp.*, 463 U.S. at 195-196), took the position in *Wardair* that Florida's sales tax involved "the regulation of those aspects of foreign commerce which by their very nature require uniform national treatment." U.S. Br. in support of prob. jur., No. 84-902 at 9.

Risk of Multiple Taxation. These conclusions, which are compelled by the Court's decisions, apply with equal force to Tennessee's tax. At the outset, the state court's suggestion that duplicative taxation is impossible in the case of a transfer tax, because the taxable event occurs only in one jurisdiction, was far too facile. In fact, other nations may impose compensating use or similar taxes upon containers delivered in Tennessee; similarly, because liability for the Tennessee taxes arises from only one of several facets of a lease—the transfer of physical possession—a sales tax may be imposed in other nations on the same lease transaction (for example, by taxing the execution of the lease). As a matter of economic substance, such taxes would duplicate Tennessee's sales tax.[8]

[8] The court below relied (App., *infra*, 14a) on the Court's observation in *Wardair* that there was no prospect of duplicative taxation because the Florida tax was imposed on "a discrete transaction which occurs within one national jurisdiction only." 477 U.S. at 9. As the point was conceded by the taxpayer, however (see *ibid.*), the Court had no occasion to consider the prospect of compensating taxes in other nations. In fact, the special nature of the event taxed in *Wardair* made compensating levies impossible. First, as a matter of law, the prospect of double taxation of aviation fuel was precluded by a treaty that prohibits localities from taxing fuel "'on board an aircraft * * * on arrival' * * * [but] does not prohibit taxation of fuel purchased in that country." *Id.* at 10. Second, as a matter of fact, the United States carefully explained that, "far from being able to tax the event of sale, foreign nations could not purport to tax even the fuel itself, which typically will be consumed in international air space en route from the United States." U.S. Br. in support of prob. jur., No. 84-902, at 31. While the Court has formally left open in the interstate setting whether a State that imposes a compensating use tax is constitutionally compelled to provide a credit for sales tax paid elsewhere (see *Williams v. Vermont*, 472 U.S. 14, 23 n.7 (1985)), it seems plain that the taxes are equivalent. See *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 583-587 (1937); McCray, *Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaluation*, 17 Urb. Law. 529, 557 (1985).

Indeed, Tennessee recognizes this and provides an offset for such taxes paid to other States when *interstate* commerce is involved; no such credit is provided, however, when foreign commerce suffers multiple taxation. See Tenn. Code Ann. 67-6-313(f) (1989), -507 (1990). If applied by other nations, such taxes "'inevitably' [would lead] to double taxation." *Container Corp.*, 463 U.S. at 193. Whether the *risk* of such duplicative taxation is enough to invalidate a state tax is an important question that was expressly left open in *Japan Line*. 441 U.S. at 452 n.17.

The "One Voice" Test. As for the so-called "one voice" prong of the *Japan Line* test, the Court has explained that "[a] state tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity in several ways." *Japan Line*, 441 U.S. at 450. In particular, "[i]f a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions." *Id.* at 450. And so far as containers are concerned, the Court concluded in *Japan Line* that "[t]he desirability of uniform treatment of containers used exclusively in foreign commerce is evidenced by the [1956] Customs Convention on Containers." 441 U.S. at 452.

Here, the Tennessee tax is a novel one that "creates an asymmetry in international maritime taxation."

Japan Line, 441 U.S. at 453. While they impose general taxes on the lease of goods, *none* of our trading partners imposes a tax on the transfer overseas of containers owned by American domiciliaries.[9] Imposition of the Tennessee tax on transfers in this country of containers owned by foreign domiciliaries accordingly will invite retaliation.[10] See *ibid.* And there is a related area of concern here. While the legal incidence of the Tennessee tax falls on the container lessor, state law provides that the tax must be separately stated on the bill submitted to the lessee and "shall be collected by the retailer from the consumer insofar as it can be done." Tenn. Code Ann. 67-6-502. This obligation to collect the tax from the lessee is mandatory. See *Hooten v. Carson*, 209 S.W.2d 273, 275 (Tenn. 1948). Indeed, a seller or lessor who fails to collect the tax at the time of the transaction may bring an action against the purchaser or lessee for the amount due or paid. See *Sam Carey Lumber Co. v. Sixty-One Cabinet Shop, Inc.*, 773 S.W.2d 252, 254-55 (Tenn. App. 1989). As a consequence, Itel's foreign customers, who will bear the burden of the tax, may demand that their governments impose corresponding tax burdens on American shippers who lease containers overseas. Furthermore, foreign nations will be encouraged to impose an entirely new class of local taxes on container use and transfer.

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[9] The member countries of the European Community, for example, have adopted a uniform system of value added taxation upon the "supply of goods and services" and the "importation of goods." O.J. European Comm. (No. L 145) art. 2 (1977) (Sixth Directive, 77/388). The system's equivalent of a sales tax is the "output" tax; the equivalent of a use tax is the "input" tax. The leasing of goods is considered a taxable supply of services. *Id.* art. 6. The Community honors its members countries' obligations under the Customs Conventions by exempting the following from value added taxation: (1) imported goods which qualify for Customs duty exemptions; and (2) supplies of services directly linked to the transit or export of goods. *Id.* arts. 14(I)(c), 15(1). Further, the United States represented in *Japan Line* that "[a]ll the other nations have adhered to the international custom of allowing containers * * * to be introduced for the exclusive purpose of conducting [foreign] commerce free of all customs duties and general taxes." No. 77-1378, U.S. Br. at 15.

[10] In addition, if other States follow Tennessee's example, foreign owned containers "will be subjected to various degrees of multiple taxation, depending on which American ports they enter. This result, obviously, would make 'speaking with one voice 'impossible." *Japan Line*, 441 U.S. at 453.

Uniform National Policy. The court below also went astray in its bald assertion that a sales tax cannot interfere with essential uniformity by "hinder[ing] the policies embodied in the Customs Convention on Containers." App., *infra*, 16a. As explained more fully below, this Court has read the Container Convention to "reflect[] a national policy to remove impediments to the use of containers as 'instruments of international traffic.'" *Japan Line*, 441 U.S. at 453 (citation omitted). A tax that makes the transfer of containers more expensive damages that policy in precisely the same way as did the property tax at issue in *Japan Line*. Indeed, in closely analogous settings the Court has made clear that the difference between sales and property taxes is "of no importance, for imposition of either tax would detract from the benefit" conferred by federal policy. *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 142 n.10 (1986); see *Xerox Corp. v. Harris County*, 459 U.S. 145, 153 (1982) (distinction between a sales and property tax "without a legal difference").

Finally, the Tennessee law intrudes in an area "where federal uniformity is essential" by taxing the transfer of containers that are used to transport to other countries goods that are produced in Tennessee and other States. While benefitting Tennessee, the tax will increase the price both of containers originating in the United States and of the cargo exported in them. That will have "harmful effects on American industry and workers" by discouraging use of American ports and the consumption

overseas of American goods. *R. J. Reynolds Tobacco*, 479 U.S. at 145. Tennessee, "by its unilateral act, cannot be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade." *Japan Line*, 441 U.S. at 453.

For present purposes, it is immaterial that the container owner was domiciled abroad in *Japan Line* and is a domestic domiciliary here. The court below expressly declined to rely on this distinction (App., *infra*, 7a-8a); as a result, the only issue presented in this case is whether there is a necessary constitutional difference between sales and property taxes. A consequence of the court's decision, moreover, is that the State appears bound to apply its tax to foreign owners who transfer possession of their containers in Tennessee.[11] And because state law requires Itel to pass on the tax to its lessees, Tennessee effectively imposes its tax in substantial part on the 80% of Itel's customers that are domiciled in foreign countries (see Trial Tr. 31-33)—customers who, under state law, have no means of challenging the constitutionality of the levy. See *Beare Co. v. Olsen*, 711 S.W.2d 603, 605 (Tenn. 1986). Prospects of retaliatory treatment therefore are squarely presented by the tax at issue here.

Any suggestion that the substantial Foreign Commerce Clause problems presented by Tennessee's tax could be avoided by withholding enforcement of the tax against containers leased by foreign lessors would itself raise serious constitutional questions, as the court below recognized. App., *infra*, 7a-8a. This Court divided four-to-four on the constitutionality under the Commerce Clause of a state tax that gave preferential treatment to foreign over domestic commerce. *Sears Roebuck & Co. v. County of Los Angeles*, 449 U.S. 1119 (1981), affirming 85 Cal. App.3d 763 (Cal. Ct. App. 1978).[12] And Justice Powell, writing for the three Members of the *Container Corp.* Court who reached the question, subsequently concluded that a State cannot discriminate against a corporation domiciled in another State and "in favor of an overseas corporation" unless it receives "explicit congressional authorization." 463 U.S. at 203 (Powell, J., dissenting). See *id.* at 204 n.6. Indeed, in *Japan Line* itself the Court expressly reserved the question whether domestically owned instrumentalities of foreign commerce are subject to state taxation. 441 U.S. at 444 n.7. Without resolution of the issues left open in these decisions, Itel's domestic domicile must be deemed immaterial to the constitutionality of Tennessee's tax.

[11] The record establishes that at least one foreign container owner transfers containers to lessees in Tennessee. See App., *infra*, at Trial Tr. 89-90.

II. A STATE SALES TAX ON CONTAINERS USED EXCLUSIVELY IN FOREIGN COMMERCE VIOLATES THE CONTAINER CONVENTIONS

Clear Federal Directive. The Tennessee tax also is flawed for a closely related reason: it is flatly inconsistent with the "clear federal directive" (*Container Corp.*, 463 U.S. at 194) embodied in the Container Conventions and their implementing regulations. As the Court explained in *Container Corp.*, a problem of this sort calls for "a species of preemption analysis" (*ibid.*), which turns on whether the state tax "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal policy. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Where the federal directive is designed to preclude interference with the international trade or foreign relations of the United States, this Court historically has been vigilant in setting aside inconsistent state taxes. See, *e.g.*, *Xerox Corp. v. Harris County*, 459 U.S. 145 (1982); *McGoldrick v. Gulf Oil*

[12] The California Supreme Court subsequently held that the differential tax violated the Commerce Clause. *Star-Kist Foods, Inc. v. Los Angeles*, 719 P.2d 987 (Cal. 1986), cert. denied, 480 U.S. 930 (1987).

Corp., 309 U.S. 414 (1940). Because these interests are at stake here—and, even more fundamentally, because the state court's departure from *Japan Line* validates a state tax that places the United States in violation of its international obligations—review by this Court is warranted.

The 1956 Convention, which was addressed by the Court in *Japan Line*, provided for the temporary admission of containers into the signatory states free of "all duties and taxes whatsoever chargeable by reason of importation" so long as they were used solely in foreign commerce and were subject to reexportation. 20 U.S.T. at 304. See *Japan Line*, 441 U.S. at 446 n.10, 453. The Convention was implemented by Treasury Department regulations designating containers "instruments of international traffic" (19 C.F.R. 10.41a(a)(1)) and by a statute excepting such instruments from application of the customs laws. 19 U.S.C. 1322(a). Pointing to this regime, the Court concluded in *Japan Line* that "[t]he desirability of uniform treatment of containers used exclusively in foreign commerce is evidenced by the Customs Convention on Containers. * * * The Convention reflects a national policy to remove impediments to the use of containers as 'instruments of international traffic.'" 441 U.S. at 452-453, quoting 19 U.S.C. 1322(a). The Court's conclusion that state taxation of containers was inconsistent with this policy was a central aspect of its holding. See 441 U.S. at 453.

Since that time, the international proscription on local regulation of containers has become considerably *stricter* with ratification of the 1972 Container Convention, which was joined by the United States in 1985. Adoption of the 1972 Convention was prompted by "the considerable increase in numbers of containers used in international traffic" and the "need both for simplifying Customs formalities and facilitating container transport." U.N. Doc. E.CONF. 59/2 (Feb. 22, 1971), at 1 (Note by the Secretariat). As the United States noted in its comment on the draft 1972 convention, the revision of the 1956 Container Convention was designed to "contribute significant economic benefits to the development and facilitation of international container traffic on a global basis." U.N. Doc. E.CONF. 59/16 (Nov. 26, 1971), at 2.

The preamble to the 1972 Convention thus affirms the treaty's purpose "to develop and facilitate international carriage by container." 988 U.N.T.S. 43, 44. And the 1972 Convention provides a broader and more precise description of proscribed taxes than did its predecessor, prohibiting the imposition of "Customs duties and all other duties, taxes, fees and other charges which are collected on, or in connection with, the importation of goods, but not including fees and charges limited in amount to the approximate cost of services rendered." *Ibid.* It also provides detailed and comprehensive regulations relating to the admission, use, design, and marking of containers. See *id.* at 45-74. These regulations are supplemented by the contemporaneously drafted International Convention for Safe Containers (39 U.S.T. 3707), which establishes safety standards, and by a network of bilateral treaties between the United States and its trading partners governing income taxation of the profits of container lessors.[13]

Pervasive Scheme of Regulation. Against this background, the Tennessee tax plainly is preempted, both by the plain terms of the Conventions, particularly the 1972 Convention, and by virtue of the pervasive scheme of federal regulation. A tax on the transfer of containers temporarily admitted to the United States as part of a continuous process of importation and exportation is one "in connection with" the import of goods—a conclusion that is evident when Tennessee's tax is contrasted with the narrow user fees that expressly are permitted by the

[13] See *Treasury Department's Model Income Tax Treaty of June 16, 1981*, Tax Treaties (CCH) ¶ 211 at 10,576 (1990) (for the avoidance of double income taxation).

Convention. This understanding also is confirmed by the failure of any party to the Convention to impose a tax such as the one at issue here. Cf. *Wardair*, 477 U.S. at 12. And, of course, the Tennessee tax plainly works as an "impediment[] to the use of containers as 'instruments of international traffic.'" *Japan Line*, 441 U.S. at 453 (citation omitted). Indeed, in *Japan Line* the United States pointed to the 1956 Convention as establishing that "disparate state laws offend a perceived need for federal uniformity" (No. 77-1378, U.S. Br. 27 n.20), explaining that "[a] state tax would frustrate accomplishment of the federal objective" (*id.* at 28) and therefore "conflicts with the spirit and design of the federal scheme." *Id.* at 29 (footnote omitted).

Any doubt about the preemptive effect of the Conventions is dispelled by the Court's decisions in *McGoldrick* and *Xerox*, which respectively invalidated state sales and property taxes on goods stored under bond in Customs bonded warehouses. Like the Container Conventions, the statutes governing such warehouses (the current versions of which appear at 19 U.S.C. 1555-1560) provide that goods may temporarily enter the United States free of Customs duties, so long as they are stored under bond in a designated facility; the goods may then be reexported or, upon payment of the duty, distributed in the United States. See *R. J. Reynolds Tobacco*, 479 U.S. at 133-134 n.3. In *McGoldrick* and *Xerox* the Court noted the policy behind the warehouse statutes of "encourag[ing] merchants here and abroad to make use of American ports." *Xerox*, 459 U.S. at 151. See *McGoldrick*, 309 U.S. at 427. And—although the statutory language in terms precluded the imposition only of Customs duties [14]—the Court held

[14] A Customs regulation in force at the time *McGoldrick* was decided provided that goods in bonded warehouses were not subject to the process of state courts and were exempt from taxation under the general laws of the States. See 309 U.S. at 426. As the Court noted in *Xerox*, however, the *McGoldrick* Court expressly declined to rely on this regulation in finding preemption. See 459 U.S. at 152, quoting 309 U.S. at 429. The regulation had been deleted by the time of the decision in *Xerox*; the Court held that "[t]he deletion * * * does not alter our conclusion that the ad valorem taxes here are pre-empted by the statutory scheme." 459 U.S. at 152-153 n.8.

that the state taxes were preempted in both cases because "the purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress." *McGoldrick*, 309 U.S. at 429. See *Xerox*, 459 U.S. at 153. In reaching this conclusion, the Court expressly found "no relevance" in the distinction between sales and property taxes. 459 U.S. at 153.

The court below offered two reasons for declining to follow *McGoldrick* and *Xerox*. First, it found the decisions inapposite because, while the warehouse statutes were designed to benefit American shippers and ports, "the Court in *Japan Line* found no Congressional intent to benefit container companies in the statutes regulating cargo containers." App., *infra*, 10a. But that reasoning is defective. The Court in *Japan Line* identified a closely related federal policy: *general* facilitation of the use of containers. See 441 U.S. at 152-153. Tennessee's sales tax frustrates federal policy in precisely the same way as did the state taxes at issue in *McGoldrick* and *Xerox*: the imposition of a state tax on the transfer of containers that enter and exit the United States in a continuous cycle of importation and exportation will "offset substantially the very benefits Congress intended to confer by remitting the duty." *Xerox*, 459 U.S. at 153 (footnote omitted).

The state court also found preemption inappropriate because, in its view, "Congress' regulation of cargo containers is less pervasive than its regulations of bonded warehouses." App., *infra*, 14a. This finding is incorrect; the relevant regulations (which were not so much as cited by the court below) and the Convention

itself impose elaborate requirements relating to the admission, operation, and design of containers that parallel those imposed on Customs warehouses.[15] But the court's observation also is beside the point: regardless of whether the container regulations are as detailed, the crucial factor here is that the Tennessee tax frustrates federal policy. Cf. *R. J. Reynolds Tobacco*, 479 U.S. at 148-149. *McGoldrick* and *Xerox* make clear that preemption is required in such circumstances.[16] Furthermore, the United

[15] See 1972 Convention art. 38, 988 U.N.T.S. at 45-46 (temporary admissions facilities and procedures); art. 9, *id.* at 46 (conditions on use of containers granted temporary admission); arts. 10, 11, *ibid.* (admission of parts and accessories); art. 12, *id.* at 47 (approval of containers used to transport goods under Customs seal); Annex 1, *id.* at 51, 52 (marking of containers); Annex 2, *id.* at 52 (obligation of container owners to provide detailed records concerning movement of temporarily admitted containers and to pay duties when conditions of admission not satisfied); Annex 3, *id.* at 52 (use of containers in internal traffic); Annex 4, *id.* at 52-61 (technical conditions on design and structure of containers); Annex 5, *id.* at 61-67 (procedures for approval of containers); 19 C.F.R. 113.66(a) (bond conditions); 19 C.F.R. Pt. 115 (procedures for approval and certification of containers). Compare 19 C.F.R. 19.1-19.6 (regulations for Customs warehouses). While it is true that goods in Customs warehouses remain under the supervision and control of Customs officers (see 19 C.F.R. 19.4; *Xerox*, 459 U.S. at 147, 148 & n.2), whereas containers do not, that is wholly a function of the practicalities of container operation; containers, of course, must move from place to place along with the goods they transport. That does not detract either from the pervasiveness of the container regulations or from the force of the policies underlying those regulations.

[16] The court below also semed to suggest that preemption is inappropriate because 19 U.S.C. 1322(a) excepts instrumentalities of foreign commerce only from the Customs laws; the court concluded that "[t]he regulations adopted pursuant to that statute, therefore, can go no further than to provide exceptions from federal customs duties." App., *infra*, 13a; see *id.* at 9a. In fact, however, the Convention itself, which of course has the force of federal law, expressly precludes a range of taxes in addition to Customs duties. In any event, the state court's observation hardly serves to distinguish *McGoldrick* and *Xerox*, which found preemptive force in statutes and regulations that in terms addressed *only* Customs duties. Indeed, the property tax disapproved in *Japan Line* as inconsistent with the

States took the position in *Japan Line* that the bonded warehouse provisions are "analogous" to the Convention (No. 77-1378, U.S. Br. at 25), concluding that "[t]he rationale of *McGoldrick* applies here as well." *Id.* at 27 (footnote omitted). This Court should intervene to bring state law into accord with federal policy.

III. A STATE TAX ON GOODS THAT ARE MOVING IN FOREIGN COMMERCE VIOLATES THE IMPORT-EXPORT CLAUSE

This case also presents another recurring issue that bears on the international trade of the United States: whether the Import-Export Clause invalidates state taxes that are imposed directly on imported or exported goods while they are in transit. The Court reserved that question in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), and in later decisions. The Fifth Circuit, in *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir. 1990), cert. denied, 111 S. Ct. 248 (1990), held that such a tax is an unconstitutional charge on exports in transit. The decision below, which cannot be reconciled with *Louisiana Land*, offers the Court an opportunity to resolve the issue.

Before *Michelin*, the Court invalidated all state taxes imposed on imported or exported goods contained in their original packaging. See *Michelin*, 423 U.S. at 282-283, discussing *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872). During that period, the Court decided *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946), which struck down a state sales tax on exported oil while in transit; the Import-Export Clause invalidated the tax because the transfer of possession of the oil "was a step in the export process." *Id.* at 84.

In *Michelin*, the Court adopted a new test to determine whether a nondiscriminatory state tax levied on imported

1956 Container Convention was no more a Customs duty than is the sales tax at issue here.

goods no longer in transit violates the Import-Export Clause. The test analyzes "the nature of the tax to determine whether it i[s] an 'Impost or Duty.'" *Department of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 752 (1978). Under the test, three policies must be considered: (1) the federal government must speak with one voice when regulating commercial relations with foreign governments; (2) import revenues should not be diverted from the federal government to States; and (3) interstate harmony might be disturbed unless seaboard States are prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports. *Michelin*, 423 U.S. at 285-286.

In using its new approach to uphold the ad valorem property tax at issue in *Michelin*, however, the Court emphasized that the levy was imposed "on imported goods that are no longer in import transit." 423 U.S. at 286. See *id.* at 302 (goods "were no longer in transit"). In *Washington Stevedoring Cos.*, the Court noted this limitation on the *Michelin* holding and declined to resolve whether state taxes on goods in transit remain *per se* unconstitutional; the Court upheld a state tax on stevedoring services because "the taxation falls upon a service distinct from the goods and their value." 435 U.S. 757 (footnote omitted). The Court added that it did "not reach the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit," "prefer[ring] to defer decision until a case with pertinent facts is presented." *Id.* at 757 n.23. See *id.* at 755. Most recently, in *R. J. Reynolds*, the Court again "observed that in *Michelin* it limited its holding to the imported goods "'no longer in transit.'" 479 U.S. at 154 (citation omitted). The Court upheld the property tax there at issue because the imported material had "nothing transitory about it." *Id.* at 155.

In *Louisiana Land*, the Fifth Circuit answered the question reserved in *Michelin*, finding it fatal to a state

sales tax that the goods were in transit at the time the tax attached. The Fifth Circuit noted that "*Richfield* has never been overruled" (900 F.2d at 819) and that in *Michelin* "the Court limited its holding to taxes levied on goods no longer in transit." *Id.* at 820. The court therefore found the crucial question in the case before it to be "whether a state may directly tax imports or exports that are in transit." *Ibid.* It answered that question in the negative, concluding that "the Import-Export Clause was specifically intended to prevent the types of taxation involved in this case" (*ibid.*) and that the imposition of such taxes would disrupt foreign policy and discourage use of American ports. *Id.* at 821. The court accordingly held that the Import-Export Clause invalidates "a tax that is levied on the goods themselves while they are in transit." *Ibid.*

This case presents an identical issue.[17] Neither the State nor the court below denied that the containers subject to tax are themselves imports or exports, even though they also are used to transport other goods. That conclusion clearly is correct; the containers would, after all, be subject to federal import duties were it not for the Convention. And by definition, the containers are goods in transit. Indeed, their movements in Tennessee "are essential to, and inseparable from, the containers' efficient use as instrumentalities of foreign commerce." *Japan Line*, 441 U.S. at 437.

In nevertheless affirming the constitutionality of the state tax, the court below—in contrast to the Fifth Circuit in *Louisiana Land*—evidently viewed *Michelin* and *Washington Stevedoring Cos.* as holding the transitory character of the goods at issue to be immaterial. See App., *infra*, 16a-17a. The state court thus moved imme-

[17] The *Japan Line* court did not consider the taxpayer's argument that California's tax violated the Import-Export Clause because it disposed of the case under the Foreign Commerce Clause and the 1956 Convention. 441 U.S. at 439 n.4.

diately to the application of the *Michelin* test. In upholding the tax, the court found it crucial that "the transfer of possession of cargo containers is a discrete transaction"; that "Tennessee's tax only compensates the state for providing protective services, so the tax will not disturb harmony among the states"; and that "the indirect nature of the tax distinguishes it from the direct taxes held invalid in *Xerox* and *McGoldrick*." *Id.* at 18a.

It is manifest, however, that these observations cannot serve to distinguish *Richfield* and *Louisiana Land*, and the court below made no serious attempt to do so. Like this case, both of those decisions involved sales taxes on "discrete transactions." The taxes at issue there were no less "compensat[ion to] the state for providing protective services" than is the levy here. And the sales tax here is no less directly imposed on the subject goods than were the sales taxes invalidated in *Richfield*, *McGoldrick*, and *Louisiana Land*. Indeed, the Court has made clear that "[i]n *Richfield*, the tax fell upon the sale of goods and was overturned because the Court had always considered a tax on the sale of goods to be a tax on the goods themselves. * * * The sale had no value or significance apart from the goods." *Washington Stevedoring Cos.*, 435 U.S. at 756, n.21. That is true here as well.[18]

While review is waranted to resolve the issue reserved in *Michelin*, the decision below is wrong even on its own

[18] The court below also suggested that "[f]ederal import revenues are not affected, because Tennessee taxes only the lease proceeds on containers delivered here, not the value of the goods themselves." App., *infra*, 18a; see also *id.* at 8a. If this observation was meant to draw a distinction between sales and lease proceeds, in which the former are said to be related "to the value of the goods themselves" and the latter are not, it plainly is insupportable. Lease payments represent the value of the goods for the term of the rental. Indeed, Tennessee, like many other States, assesses the "true value" of tangible property for ad valorem tax purposes by capitalizing rental income. Tenn. Code Ann. 67-5-602(c)(1); *National Life & Accident Ins. Co. v. Keaton*, 1986 Westlaw 4846 (Tenn. App.).

terms. Because the containers are in transit to other nations, the Tennessee tax is "no more than [a] transit fee[] on the privilege of moving through a State" (*Michelin*, 423 U.S. at 290 (footnote omitted)); the Clause was intended to invalidate just such levies.[19] While the policies served by the Import-Export and Foreign Commerce Clauses are closely related (see *Japan Line*, 441 U.S. at 449-450 n.14), the former "states an absolute ban, whereas the [latter] merely grants power to Congress." *Washington Stevedoring Cos.*, 435 U.S. at 751. The application of a *per se* ban on state taxes imposed on American imports and exports while in transit serves the broader purposes of the Import-Export Clause by preventing States from taking advantage of their location to the detriment of American export trade. Indeed, the United States explained in *Japan Line* that the tax there at issue violated the Import-Export Clause because "the tax affects foreign relations, causes multiple tax burdens, and is levied on containers that are still part of foreign commerce and have never been formally entered into United States commerce." No. 77-1378, U.S. Br. at 32 n.23. The decision below discounted all of these consequences. Review by this Court accordingly is warranted.

[19] As a leading commentator has explained, a "basis for deciding in-transit tax cases under the new Import-Export Clause jurisprudence may be found in the purpose of the clause to prevent the seaboard States from exacting a tax on 'goods merely flowing through their ports.' A sales tax on goods being exported that is imposed at the point of delivery of title and possession of goods to the purchaser or his shipper for transport to the purchaser can be fairly regarded as such an exaction and, therefore, as a 'transit fee' that is repugnant to the Import-Export Clause." I J. Hellerstein, *State Taxation* § 5.4 at 189-190 (1983).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP W. COLLIER
Counsel of Record
JAMES C. SEIFFERT
T. MORGAN WARD, JR.
Stites & Harbison
600 West Main Street
Louisville, KY 40202
(502) 587-3400

ANDREW L. FREY
CHARLES ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Petitioner

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

S/C No. 01-S-01-9005-CH-00038

ITEL CONTAINERS INTERNATIONAL CORPORATION,
Plaintiff/Appellant,

vs.

CHARLES E. CARDWELL,
Commissioner of Revenue, State of Tennessee,
Defendant/Appellee.

DAVIDSON CHANCERY

HON. ROBERT BRANDT, Chancellor

FOR PUBLICATION

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For Appellant:

Phillip W. Collier
James C. Seiffert
T. Morgan Ward, Jr.
Louisville, Kentucky

James C. Gooch
Michael D. Sontag
Nashville, Tennessee

For Appellee:

Charles W. Burson
Attorney General
and Reporter

Daryl J. Brand
Assistant Attorney General
Nashville, Tennessee

For Amicus Curiae: Institute of International Container Lessors

Charles A. Trost
Nashville, Tennessee

Edward A. Woolley
Bedford, New York

Affirmed.

ANDERSON, J.

OPINION

This case presents the question whether Tennessee may constitutionally impose a sales tax upon the transfer of possession in Tennessee of domestically-owned cargo containers used exclusively in international commerce. The Chancellor held that the imposition of such a tax is constitutionally permissible. We agree and affirm.

The facts were stipulated at trial as follows:

Itel Containers International Corporation ("Itel") is a Delaware corporation, with its principal place of business in San Francisco, California. Itel's principal business is the leasing of cargo containers which are used exclusively in international commerce. These containers are manufactured and purchased abroad by Itel, and enter the United States as instruments of international traffic. Itel has posted with the United States Customs Service a continuous bond which guarantees payment of all duties, taxes, or liquidated damages which could be assessed for a failure to comply with government regulations regarding Itel's withdrawal of any of the containers from international commerce.

Itel solicits container leases world-wide through its marketing offices located in numerous U.S. cities, but Itel conducts no marketing solicitation from any Tennessee location. Itel accepts leases of its containers only in its San Francisco office. All of its container leases restrict the use of the containers to international commerce. As a result of its international operations, Itel allows its customers to pick up and re-deliver containers at numerous locations around the world and in the United States.

In Tennessee, Itel receives, repairs, stores, and delivers containers at its terminal building in Memphis, and also, by contract with other independent terminals, at two other Tennessee locations. Itel is registered as a dealer with the Tennessee Department of Revenue, and collects

and remits sales and use tax on fees which it collects for repair services rendered in Tennessee.

The tax assessment complained of in this appeal is based upon Itel's leases of its cargo containers which were delivered in Tennessee to international carriers for international shipments. These leases began when the carriers took delivery of the containers at Itel's Tennessee locations.

Itel earns no revenue from the use of the containers while they are present in Tennessee, until they are picked up by the international carrier/lessee. The Department of Revenue computed the sales tax based upon its calculation of the average container days leased, and the average number of containers leased per month. Itel paid the assessment of tax, penalties, and interest under protest, and filed this action to recover those sums.

QUESTIONS PRESENTED

Itel challenges the validity of the tax assessment, I. on the statutory grounds that the mere transfer of possession of cargo containers in Tennessee is not a "sale" according to Tenn. Code Ann. § 67-6-102(23)(A), and that because its containers have not "become a part of the mass of property in this state," they are exempt from Tennessee sales tax pursuant to Tenn. Code Ann. § 67-6-211, II. alternatively, Itel aserts that Tennessee's imposition of a sales tax upon leases of federally bonded instruments of international traffic violates the Commerce, Supremacy, Import/Export, and Due Process clauses of the United States Constitution.

I.

STATUTORY AUTHORITY TO TAX

Itel argues that the mere transfer of possession of leased property in Tennessee is not a taxable event. The Tennessee Retailer's Sales Tax Act imposes sales tax on

the lease or rental of tangible personal property in this state. Tennessee Code of Annotated § 67-6-201 provides:

> It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state . . . or who rents or furnishes any of the things or services taxable under this chapter . . . or who leases or rents such property, either as lessor or lessee, within the state of Tennessee . . . .

"Lease or rental" is also included within the statutory definition of "sale:"

> "Sale" means *any transfer of* title or *possession*, or both, exchange, barter, *lease or rental*, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property *for a consideration* . . . .

Tenn. Code Ann. § 67-6-102(23)(A) (emphasis added).

Itel cites *Magnavox Consumer Electronics v. King*, 707 S.W.2d 504 (Tenn. 1986), in support of its assertion that the legislature intended only to tax proceeds of leases entered into within Tennessee. In *Magnavox* we considered whether the use of vehicles by a lessee pursuant to a vehicle lease entered into in the state of Indiana were subject to Tennessee's use tax, Tenn. Code Ann. § 67-6-210. Itel's reliance on *Magnavox* could not be more misplaced, however, because in *Magnavox* we held that the use tax may be imposed upon lessees who lease property outside of this state for use in Tennessee.

No other authority is cited by Itel for its assertion, and we find that the statutory language quoted above is a clear declaration of the legislature's intent to tax the transfer of possession of tangible personal property in Tennessee, pursuant to lease agreements executed outside of Tennessee.

Itel argues that the delivery of its containers in Tennessee is exempt from taxation pursuant to Tenn. Code Ann. § 67-6-211, because its containers have not "come to rest" in Tennessee. Tennessee Code Annotated § 67-6-211 declares:

> It is the intention of this chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

We have held that this statute was intended "to extend the taxing power of the state of Tennessee to the fullest extent under the Commerce Clause," *Texas Eastern Transmission Corporation v. Benson*, 480 S.W.2d 905, 907 (Tenn. 1972), and that "where a tax does not constitute a violation of the Commerce Clause, no exemption is available under [the statute]," *Williams Rentals, Inc. v. Tidwell*, 516 S.W.2d 614, 615 (Tenn. 1974). Consequently, the next question to be resolved is whether the challenged tax assessment violates the Commerce Clause of the United States Constitution.

II.

UNITED STATES CONSTITUTIONAL AUTHORITY TO TAX

Initially, we note that the United States Supreme Court has held that California's imposition of its *ad valorem* property tax, assessed upon the value of identical cargo containers used exclusively in foreign commerce, violated the Commerce Clause. In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 99 S. Ct. 1813 (1979), the Court held that

> the Constitution confers no immunity from state taxation, and . . . interstate commerce must bear its fair share of the state tax burden. Instrumentalities

> of interstate commerce are no exception to this rule . . . if the state tax is applied to an activity with a substantial nexus wtih the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state, no impermissible burden on interstate commerce will be found. *Complete Auto Transit v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 1079 (1977).

441 U.S. at 444-45, 99 S. Ct. at 1819 (other citations omitted). The Court assumed that "if the containers were instrumentalities of interstate commerce, *Complete Auto* would apply and be satisfied . . . ." 441 U.S. at 445, 99 S. Ct. at 1820.

Next, however, the Court held that Japan Line's containers "are instrumentalities of foreign commerce, both as a matter of fact and as a matter of law," 441 U.S. at 445-446, 99 S. Ct. at 1820, and that when a state seeks to tax the instrumentalities of foreign commerce, rather than of interstate commerce,

> a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents federal government from speaking with one voice when regulating commercial relations with foreign governments. If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

Japan Line, 441 U.S. at 451, 99 S. Ct. at 1823. Applying this test, the Supreme Court held that California's imposition of its property tax upon Japanese-owned shipping containers violated the Commerce Clause because the tax "results in multiple taxation of the instrumentalities of foreign commerce," and the tax "prevents this nation from speaking with one voice in regulating foreign trade." *Japan Line*, 99 S. Ct. at 1823.

Itel's containers, like Japan Line's containers, are instrumentalities of foreign commerce. The United States is a signatory to at least two international agreements concerning these containers. The Customs Convention on Containers [1] grants containers "temporary admission free of import duties and import taxes and free of import prohibitions and restrictions," provided they are used solely in foreign commerce and subject to re-exportation. Japan and the United States are signatories to a Bilateral Tax Convention [2] which, in order to prohibit double taxation of cargo containers, provides that

> income derived by *a resident of a contracting state* . . . *from the* use, maintenance, and *lease of containers* and related equipment . . . in connection with the operation in international traffic of ships or aircraft . . . is exempt from tax in the *other* contracting state."

Id. (emphasis added).

However, two features distinguish this case from *Japan Line*: First, unlike Japan Line, Ltd., Itel is a domestic American corporation, and the lease of its containers delivered in Tennessee are not taxed abroad; thus, the sales tax imposed by Tennessee creates no multiple international taxation in fact. The *Japan Line* Court recognized that foreign-owned shipping containers are distinguishable from domestically-owned containers, for the Court stated: "[W]e do not reach questions as to the taxability . . . of domestically-owned instrumentalities engaged in foreign commerce." *Japan Line*, 99 S. Ct. at 1819, fn. 7. Second, *Japan Line* concerned a direct ad valorem property tax on the value of the containers, while Itel challenges the validity of a sales tax assessed upon

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[1] 20 U.S.T. 301, 304, T.I.A.S. No. 6634 (1969).

[2] Convention between the United States of America and Japan for the Avoidance of Double Taxation (Bilateral Tax Convention), March 8, 1971 [1972], 23 U.S.T. 967, 1084-85, T.I.A.S. No. 7365.

the proceeds of leases of containers delivered in Tennessee. Since a state tax which discriminates against domestically-owned containers by exempting foreign-owned containers raises serious Equal Protection problems, we decline to consider the domicile of the owner of the containers as relevant.

As a threshold question, therefore, we consider whether the property tax held invalid in *Japan Line* is distinguishable from the sales tax assessed against Itel for the purpose of determining the constitutionality of the tax. Itel insists, of course, that the two taxes are not distinguishable, citing *Xerox Corporation v. Harris County, Texas*, 459 U.S. 145, 103 S. Ct. 523 (1982), *McGoldrick v. Gulf Oil Corporation*, 309 U.S. 414, 60 S. Ct. 64 (1940), *Ritchfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 67 S. Ct. 156 (1946), and *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900F.2d 816 (5th Cir. 1990), as authority.

In *Ritchfield* and *Louisiana Land*, the Supreme Court and the 5th Circuit Court of Appeals, respectfully, found that sales taxes, like property taxes, violate the Import/Export Clause when imposed directly on goods destined for export. Because Tennessee's tax on container leases is not a direct tax on the value of goods destined for export, however, those cases are unpersuasive.

In *Xerox* and *McGoldrick*, the Supreme Court held that both property taxes and sales taxes assessed upon goods held in government-bonded warehouses violated the Supremacy Clause,[3] because "Congress intended to make customs-bonded warehouses federal enclaves free of state taxation." Accordingly, the Court held that "state property taxes on goods stored under bond in a customs warehouse

[3] "This Constitution, and the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2.

are pre-empted by Congress' comprehensive regulation of customs duties." The Court found it

> unnecessary . . . to consider whether, absent congressional regulation, the taxes here would pass muster under the Import-Export Clause or the Commerce Clause.

Xerox, 459 U.S. at 154, 103 S. Ct. at 528.[4]

The Federal Customs Warehouse statutes, 19 U.S.C. §§ 1555 and 1557, differ significantly from the statute regulating cargo containers, 19 U.S.C. § 1332. While in bonded warehouses, imported goods are in the joint custody and continuous control and supervision of customs officers of the United States Customs Service and the warehouse proprietor. 19 U.S.C. § 1555(a). "Detailed regulations control every aspect of the manner in which the warehouses are to be operated." *Xerox*, 459 U.S. at 150, 103 S. Ct. at 526; *see* 19 C.F.R. §§ 19.1-19.6 (1982). In contrast, the statute "regulating" cargo containers merely provides that "instruments of international traffic . . . shall be granted the customary exceptions from the application of the *customs* laws." 19 U.S.C. § 1322(a) (emphasis added). Cargo containers are neither under the supervision nor in the custody of customs officers.

Clearly, Congress has the power to prohibit state sales taxes on cargo container leases, in order to benefit cargo container companies. In *Xerox*, the Court explicitly held that the customs-bonded warehouse statutes were in-

[4] The broad holdings of *Xerox* and *McGoldrick* have since been limited to provide a prohibition of state taxation only of goods destined for export. In *R.J. Reynolds Tobacco v. Durham County, N.C.*, 479 U.S. 130, 107 S. Ct. 499 (1986), the Court stated:

> It is difficult . . . to believe that the purposes in forming the customs-bonded warehouse scheme identified by the Court in *Xerox* would be disserved by the imposition of *ad valorem* property taxes on Reynold's imported tobacco.

Id., 479 U.S. at 144, 107 S. Ct. at 509.

tended by Congress "to stimulate business for American industry and work for Americans." *Xerox*, 459 U.S. at 451, 103 S. Ct. at 526. In both *Xerox* and *McGoldrick*, the Court found that it would be incompatible

> with the comprehensive scheme Congress enacted to effect [its] goals if the states were free to tax such goods while they were lodged temporarily in government-regulated bonded storage in this country. . . . First, Congress sought, in the statutory scheme reviewed in *McGoldrick*, to benefit American industry by remitting duties otherwise due. The import tax on crude oil was remitted to benefit oil refiners employing labor at refineries within the United States, whose products would not be sold in domestic commerce. [In *Xerox*], the remission of duties benefited those shippers using American ports as trans-shipment centers. Second, the system of customs regulation is as pervasive for the stored goods in [*Xerox*] as it was in *McGoldrick* for the refined petroleum. In both cases, the imported goods were segregated in warehouses under continual federal custody and supervision. Finally, the state tax was large enough in each case to offset substantially the very benefits Congress intended to confer by remitting the duty.

Xerox, 459 U.S. at 151-53, 103 S. Ct. at 527. In contrast, the Court in *Japan Line* found no Congressional intent to benefit container companies in the statutes regulating cargo containers. In the absence of any such Congressional intent, *Xerox* and *McGoldrick* support the conclusion that Congress has not preempted state sales taxes on the transfer of possession of cargo containers. Therefore, nothing in those cases persuades us that sales taxes are indistinguishable from property taxes.

The United States Supreme Court has held that it "was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of

doing business," *Complete Auto*, 430 U.S. at 288, 97 S. Ct. at 1079, and the Court has endorsed that proposition in the international commerce context. In *R.J. Reynolds Tobacco v. Durham County, N.C.*, 479 U.S. 130, 107 S. Ct. 499 (1986), the Supreme Court recognized that "since this imported tobacco receives the same local governmental services, such as police and fire protection, as domestic tobacco, [if the tax is invalidated] local taxpayers would be forced to provide a subsidy in excess of a million dollars to Reynolds." 479 U.S. at 146, 107 S. Ct. at 510. Similarly, in *Department of Revenue v. Association of Washington Stevedoring Company*, 435 U.S. 734, 747, 98 S. Ct. 1388, 1396 (1978), the Supreme Court also held that "the Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate [5] activity." The Court then weighed the state's interest in exacting from international commerce "its fair share of the cost of state government" against the burden imposed by the tax on international commerce, and concluded that Washington state's "business and occupation tax" on the discrete activity of loading and unloading ships engaged in interstate and international commerce did not violate the Commerce Clause. *Washington Stevedoring*, 435 U.S. at 748, 87 S. Ct. at 139d.

Moreover, the Supreme Court has recently upheld a state sales tax which burdened foreign commerce. In *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, 106 S. Ct. 2369 (1986), the Court applied its *Japan Line* test to determine that Florida's imposition

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[5] *Washington Stevedoring* predates *Japan Lines*, so the Court made no distinction between interstate and foreign commerce in its Commerce Clause analysis. Nevertheless, the holding of *Washington Stevedoring* applies to both interstate and foreign commerce, and the case was cited with approval in *Japan Line*, 441 U.S. at 444, 99 S. Ct. at 1819.

of a sales tax on jet fuel sold to international carriers did not violate the Commerce Clause. Thus, while sales taxes which burden foreign commerce have been upheld (*Wardair*) and a "Business and Occupation" tax on the service of loading and unloading goods in foreign commerce has been upheld (*Washington Stevedoring*) never has a direct *property* tax on goods still in international commerce been upheld. Tennessee's sales tax on the transfer of possession of containers used to move goods in foreign commerce is more analogous to a sales tax on fuel used to move passengers in foreign commerce, and to an occupation tax on the activity of loading and unloading cargo in foreign commerce, than to the direct *ad valorem* property tax imposed by California on Japan Line's cargo containers.

We conclude, therefore, that the sales tax assessed against Itel is distinguishable from a direct *ad valorem* property tax, and we hold that *Japan Line*, while instructive of the appropriate Commerce Clause analysis, is not dispositive of this case. Consequently, we return to the facts of this case and proceed to apply the *Japan Line* test to those facts.

A. THE COMMERCE CLAUSE [6]

The first step in *Japan Line*'s Commerce Clause analysis consists of *Complete Auto*'s four-fold requirements. We are persuaded that Itel's containers have a "substantial nexus" with Tennessee, since they are present within the state at the time of transfer of possession to each lessee, and since the containers are in the custody of Itel's employees and agents in Tennessee. Moreover, the tax is "fairly apportioned," since it is levied only on the

[6] "Congress shall have power . . . to regulate commerce with foreign Nations, and among the several states . . . ." U.S. Const. art. I, § 8, cl. 3.

proceeds of leases pursuant to which the lessee takes delivery in Tennessee. The tax does not "discriminate," since it falls evenhandedly on all leased personal property in the state; and finally, the tax is "fairly related to the services provided by [Tennessee], services that include not only police and fire protection, but also the benefit of a trained work force and the advantages of a civilized society." *Japan Line*, 441 U.S. at 445, 99 S. Ct. at 1820.

Itel argues that federal customs regulations, specifically 19 C.F.R. § 1041A(c) and (d), require that bonded cargo containers are to be treated as having never entered the United States. Therefore, since Itel's containers have no "presence" in Tennessee for U.S. Customs purposes, they may not be taxed because the "nexus test" of *Complete Auto* is not satisfied. Essentially, this is a variation of Itel's preemption and Supremacy Clause argument.

The federal statute pursuant to which the customs regulations were adopted, 19 U.S.C. § 1322(a), provides merely that "instruments of international traffic . . . shall be granted the customary exceptions from the application of the *customs* laws." (Emphasis added.) The regulations adopted pursuant to that statute, therefore, can go no further than to provide exceptions from federal customs duties. Because Tennessee's sales tax is not a federal customs duty, the customs statute and regulations are inapposite. Cargo containers bonded by the customs agency of the United States Treasury Department may well not be "present" in Tennessee for U.S. Customs purposes; but we hold the Itel's containers are present in the state of Tennessee for Tennessee sales tax purposes.[7]

[7] This disposes also of Itel's argument that the sales tax violates the Due Process Clause of the Fourteenth Amendment, which has been construed to permit state taxation on the basis of "the habitual employment of . . . property within the state." *Braniff Airways v. Nebraska State Board of Eq. & A.*, 347 U.S. 590, 601, 74 S. Ct. 757, 764 (1954) (citation omitted).

Williams Rentals, Inc. v. Tidwell, supra, 516 S.W.2d 614 (Tenn. 1974).

Moreover, the same argument was made and disposed of *R.J. Reynolds, supra*, 479 U.S. at 156, 107 S. Ct. at 515, in the context of goods stored in a government-bonded warehouse. Because we have found that Congress' regulation of cargo containers is less pervasive than its regulation of bonded warehouses, the argument that Congress has preempted state taxation must fail here as well.

We hold that Tennessee's sales tax meets the four-fold requirements of *Complete Auto*. Therefore, we proceed next to consider the additional two-part test articulated in *Japan Line* for determining whether a state tax on the instrumentalities of foreign commerce violates the Commerce Clause.

The first such question is whether the tax creates an enhanced risk of multiple international taxation. In *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, 106 S. Ct. 2369 (1986), *supra*, the Court summarily dismissed the possibility that a sales tax on jet fuel sold to international carriers created an enhanced risk of multiple international taxation:

> [T]here is no threat of multiple international taxation in this case, since the tax is imposed only upon . . . a *discreet transaction* which occurs within one national jurisdiction only.

Id., 477 U.S. at 9, 106 S. Ct. at 2373 (emphasis added).

Other nations very well may adopt similar taxes on the transfer of possession of leased containers within their taxing jurisdictions. However, we hold that the transfer of possession of cargo containers in Tennessee is a discrete transaction, occurring only within Tennessee, which creates no risk of multiple international taxation.[8]

[8] The fact that other jurisdictions might tax other transactions involving these containers is irrelevant. For example, other nations may impose landing fees on Wardair Canada's jets, or sales taxes on the passenger tickets; this clearly is not what is meant by "multiple international taxation" in *Wardair* or *Japan Line*, or by "double taxation" in the Bilateral Tax Convention, *supra*, at fn. 3.

The second test for validity of state taxation of instruments of foreign commerce articulated in *Japan Line* is whether the tax "prevents the federal government from speaking with one voice when regulating commercial relations with foreign governments." In *Department of Revenue v. Association of Washington Stevedoring Companies, supra*, 435 U.S. 734, 98 S. Ct. 1388 (1978), the Court held that:

> the assessments in this case are only upon business conducted entirely within Washington. No foreign business or vessel is taxed. Respondents, therefore, have demonstrated no impediment posed by the tax upon the regulation of foreign trade by the United States.

Id., 435 U.S. at 754, 98 S. Ct. at 1401. Likewise, Itel has demonstrated no impediment posed by Tennessee's tax upon the regulation of foreign trade by the U.S. government.

In *Japan Line*, the Court identified three reasons for its elaborate Commerce Clause analysis:

> A state tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity in several ways. If the state imposes an apportioned tax, international disputes over reconciling apportionment formulae may arise. If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing state, so that the nation as a whole would

> suffer. If other states followed the taxing state's example, various instrumentalities could be subject to carrying degrees of multiple taxation, a result that would plainly prevent this nation from speaking with one voice in regulating foreign commerce.

Japan Line, 441 U.S. at 450-51, 99 S. Ct. 1822-23. None of these concerns are implicated by a sales tax on a discrete transaction occurring only in one jurisdiction. *Wardair*, *supra*; *Washington Stevedoring*, *supra*.

Because Tennessee's sales tax is imposed upon the discrete transaction of the transfer of possession of leased cargo containers in Tennessee, we find that the sales tax will not hinder the policies embodied in the Customs Convention on Containers, impair uniformity where essential, or prevent the Federal Government from speaking with one voice when regulating commercial relations with foreign governments. Consequently, we hold that the tax assessed against Itel is not prohibited by the Commerce Clause.

B. THE IMPORT/EXPORT CLAUSE [9]

Relying on *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 67 S. Ct. 156 (1946), Itel also contends that the Tennessee sales tax violates the Import/Export Clause.

> *Richfield* has never been overruled by the United States Supreme Court. However, in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S. Ct. 535 (1976), the Court initiated a new approach to the Import/

[9] "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress." U.S. Const. art. 1, § 10, cl. 2.

> Export Clause. . . . The *Michelin* Court focused on the nature of the [state] tax. Specifically, the Court outlined three policies that were to be served by the Clause.
>
> First, the federal government must speak with one voice when regulating commercial relations with foreign governments . . . . Second, import revenues were to be the major source of revenue for the federal government and should not be diverted to the states. Finally, harmony among the states might be disturbed unless seaboard states, with their crucial ports of entry, were prohibited from levying taxes on citizens of other states by taxing goods merely flowing through their ports to the other states not situated as favorably geographically. *Michelin*, 423 U.S. at 285-86, 96 S. Ct. at 540-41.

Louisiana Land & Exploration v. Pilot Petroleum, 900 F.2d 816, 819 (5th Cir. 1990).

In *Washington Revenue Dept. v. Stevedoring Association*, *supra*, 435 U.S. 734, 98 S. Ct. 1388 (1978), the Court applied the *Michelin* three-prong policy test, and found that none of those policies were threatened by Washington's business and occupation tax on the discrete service of loading and unloading ships in international commerce. Specifically, the federal government's ability to conduct foreign policy was not affected, because the tax was assessed against all businesses, upon discrete transactions occurring wholly within the state. Federal import revenues were not affected, because Washington taxed only the value of the loading and unloading of the goods, not the value of the goods themselves, and since the tax only compensated the government for providing protective services, it would not disturb harmony among the states. Most important to the Court was the indirect nature of the tax, the fact that the tax did not relate to the value of the goods, and the fact that the tax was applied to discrete services provided wholly within the state.

We have carefully considered the "one voice" test as part of our Commerce Clause analysis, above, and concluded Tennessee's tax meets this test. Like the business of stevedoring, the transfer of possession of cargo containers is a discrete transaction which does not impair the federal government's ability to speak with one voice in its conduct of foreign policy.

Federal import revenues are not affected, because Tennessee only taxes the lease proceeds on containers delivered here, not the value of the goods themselves. Tennessee's tax only compensates the state for providing protective services, so the tax will not disturb harmony among the states. Moreover, the indirect nature of the tax distinguishes it from the direct taxes held invalid in *Xerox* and *McGoldrick*. For these reasons, we hold that Tennessee's sales tax, as applied to the transfer of possession of cargo containers in Tennessee, does not violate the Import/Export Clause.

CONCLUSION

We have held that the Tennessee Department of Revenue has statutory authority to tax the transfer of possession of cargo containers in Tennessee, and that the imposition of that tax upon Itel does not violate the Commerce, Import/Export, Supremacy, or Due Process Clauses of the United States Constitution. Consequently, the judgment of the Chancellor is affirmed. Costs are taxed to the appellant.

/s/ E. Riley Anderson
E. RILEY ANDERSON
Justice

Concur:

Reid, C.J.
Drowota, O'Brien, and Daughtrey, JJ.

APPENDIX B

IN THE CHANCERY COURT FOR THE
STATE OF TENNESSEE
20TH JUDICIAL DISTRICT
DAVIDSON COUNTY
PART THREE

No. 88-3479-III

ITEL CONTAINERS INTERNATIONAL CORPORATION

vs.

CHARLES E. CARDWELL,
Commissioner of Revenue, State of Tennessee

[Filed Dec. 20, 1989]

MEMORANDUM

This case is before the Court on the plaintiff taxpayer's suit for refund of taxes, penalties, and interest paid to defendant Tennessee Department of Revenue. At issue is whether leases on overseas cargo containers distributed in Tennessee should be subject to taxation under the Retailers' Sales Tax Act, T.C.A. § 67-6-101, *et seq.*

The plaintiff, Itel Containers International Corporation, a Delaware corporation based in San Francisco, leases cargo containers to steamship carriers for overseas shipments. Itel enters its leases through two types of transactions: shipper pool arrangements and Master

Interchange ("MI") agreements.* With shipper pool arrangements, shippers intending to use overseas carriers pick up empty cargo containers free of charge from Itel at regional locations, then load and transport them to the port of exit. Shipper pool leases between Itel and the steamship carriers for the containers do not begin until the containers arive at port. MI agreements permit the carriers themselves to reserve cargo containers for later use. These leases begin when the carriers take delivery of the containers at the regional locations.

Itel has several container pickup locations in Tennessee, including its own terminal and storage depots owned and operated by third parties. The Department claims that Itel owes state sales tax on any lease of cargo containers distributed to either shippers and carriers from these pickup sites in the state.

Under the Retailers' Sales Tax Act, a taxable sale is defined in part as ". . . any transfer of title or possession, or both, exchange, barter, lease or rental, conditional, or otherwise, in any manner or by any means whatsoever of tangible property for a consideration. . . . T.C.A. § 67-6-102(23)(A). The Department argues that this definition of a taxable sale so long as Itel's cargo both shipper pool and MI lease agreements fall within containers change hands in Tennessee as part of their leasing arrangements.

Since it is the transfer of possession for consideration that is being taxed by Tennessee, the difference in the parties taking delivery of the containers in the state under the two types of lease transactions calls for a distinction in tax treatment. With shipper pool arrangements, the taxable event under T.C.A. § 67-6-102(23)(A), transfer of possession for consideration, takes place

* A third type of taxed transaction, the short term lease, is similar to a MI lease in most respects, and will be included with MI leases for purposes of discussion.

at the port of exit when the containers are turned over to the carriers. It is at port that the carriers' control over the containers and their obligation to pay under the lease begin. The Retailers' Sales Act, therefore, would not apply to these transactions since they occur out of state. Any taxes paid by Itel for leases under shipper pool arangements should be refunded by the Department.

The MI agreements, however, provide for direct release of the containers to the carriers themselves in Tennessee. These transactions fall squarely within the definition of a taxable sale, since transfer of possession from Itel to the leasing parties is completed in the state. Insofar as Itel has paid taxes, interest, and penalties on its MI lease agreements, Itel is not entitled to any refund.

In reaching this decision, the Court finds no intrusions on international commerce. *See* U.S. Const. art. I, section 8, cl 3. *See also* T.C.A. § 67-6-313(a). Businesses are not relieved of their just share of state tax burden simply because they are engaged in interstate commerce. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288, 97 S. Ct. 1076, 1083, 51 L. Ed. 2d at 326, 336-37 (1977). A state may tax any business activity having a substantial connection with that state, so long as the tax is apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state. *Id.* at 279, 97 S. Ct. at 1079, 51 L. Ed. 2d at 331. The same rule applies to international commerce. *Japan Line, Ltd. v. County of Los Angeles*, 44 U.S. 434, 444-445, 99 S. Ct. 1813, 1819, 60 L. Ed. 2d 336, 345 (1979). The Tennessee tax is justified under these criteria.

Itel located cargo container storage facilities in this state for the business advantage of regional deliveries. This connection with the state is a sufficient threshold for tax liability to Tennessee. Further, Itel's advantage of location in Tennessee is realized when it earns the right to payment by delivering over its containers to leasing

customers in this state. It is logical that this should also be the event being taxed by to Tennessee. The state tax goes no further than this portion of Itel's business. There are no discriminatory effects on international commerce by taxing Itel since the tax assessed on MI leases is no different from the tax assessed by the state whenever any goods change hands for consideration in Tennessee. Itel enjoys the economic benefits of locating part of its operations in Tennessee as well as the protections the state provides while its containers are stored here. Itel is simply being asked to pay for what it is getting.

None of the additional factors suggesting a burden on international commerce in *Japan Line* are present with Tennessee's sales tax on Itel's MI lease transactions. *See* 44 U.S. at 451-53, 99 S. Ct. at 1823-24, 60 L. Ed. 2d at 350. In that case, the federal government's interest in "speaking with one voice" regarding matters of foreign commerce was affected by several local governments' decision to place an ad valorem property tax on Japanese-owned cargo containers temporarily in this county. The same cannot be said for Tennessee's decision to place a sales tax on all transfers of leased property in the state, including cargo containers, since the tax is on a transaction and not specifically on an item used for carrying on foreign trade. It is the value of doing business in this state that is being taxed, not the value of the cargo containers. The Court finds no impairment of uniform trade regulation by the Tennessee sales tax.

Moreover, none of the risks of multiple taxation identified in *Japan Line* can result from taxing transfers of possession of leased goods. It is a one-time event in a lease that can only occur in one taxing jurisdiction. Since Itel is a United States corporation enjoying the benefits of transferring cargo in containers Tennessee, it is Tennessee's prerogative to tax this activity.

The Court finds that Itel is entitled to a refund of taxes, penalties and interest attributable to taxes levied against its leases under shipper pool arrangements only. Counsel for Itel should submit the judgment order. Costs are assessed to the defendant.

/s/ Robert S. Brandt
ROBERT S. BRANDT
Chancellor

December 20, 1989

cc: James C. Gooch
Michael D. Sontag
Daryl J. Brand
Philip W. Collier

IN THE CHANCERY COURT
FOR DAVIDSON COUNTY, TENNESSEE
20th JUDICIAL DISTRICT
PART III

No. 88-3479-III

ITEL CONTAINERS INTERNATIONAL CORPORATION

v.

CHARLES E. CARDWELL
Commisisoner of Revenue, State of Tennessee

[Order Filed & Entered Feb. 23, 1990; Minute Book 56, Page 241]

FINAL ORDER

This case was tried on November 29, 1989. Upon the pleadings, the stipulations of the parties, the testimony of plaintiff's witnesses presented at trial, exhibits introduced at trial, the briefs and arguments of counsel and the entire record and after consideration of all the evidence presented, the Court, on December 20, 1989, announced its findings of fact and conclusions of law in a Memorandum, filed with the Clerk and Master on the same date, and which is incorporated herein by reference.

The Court found that the parties had agreed upon a revised assessment, which reduced the amount in dispute in this case from the sum of $382,465.00 in tax, penalty, and interest paid by Itel to a revised total of $259,504.00 in tax, penalty, and interest, and that the Department of

Revenue had agreed to refund to Itel the difference between those amounts, i.e., $122,961.00. In addition, the Court found that the parties had agreed to recompute the assessment to account for a shift in one of the audit sample test periods from March 1985 period originally sampled in the audit to a period of February 15 to March 15, 1985 which recomputation further reduced the amount in dispute in this case to the sum of $238,894.00 in tax, penalty, and interest and that the Department of Revenue had agreed to refund to Itel $20,610.00 (i.e. the difference between $259,504.00 — $238,894.00).

After trail, and as set forth in the Memorandum, the Court found that (i) Itel is entitled to a refund from the State of Tennessee of taxes, penalty and interest attributable to taxes levied against its leases under shipper pool arrangements in the amount of $80,882.00, and (ii) all master interchange agreements which provide for the delivery of the containers to the lessees' carriers themselves in Tennessee fall within the definition of taxable sale and insofor as Itel has paid taxes, interest and penalties on its master interchange lease agreements, it is not entitled to any refund. Therefore, the revised assessment of $158,012.00 in tax penalty and interest attributable to those transactions is sustained.

IT IS THEREFORE ORDERED, that judgment is entered in favor of Itel and against the State of Tennessee in the amount of $224,453.00 plus interest pursuant to T.C.A. § 67-1-1803(b) and that the costs of this cause are taxed against the State of Tennessee.

Entered this — day of ——, 1990.

/s/ Robert S. Brandt
ROBERT S. BRANDT
Chancellor

Approved for entry:

/s/ Philip W. Collier
PHILIP W. COLLIER
JAMES C. SEIFFERT
Stites & Harbison
600 West Main Street
Louisville, KY 40202
Counsel for Itel Containers
International Corporation

/s/ Michael D. Sontag
MICHAEL D. SONTAG
JAMES C. GOOCH
Bass, Berry & Sims
2700 First American Center
Nashville, TN 37238
Co-Counsel for Itel Containers
International Corporation

/s/ Daryl J. Brand
DARYL J. BRAND (10203)
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37219
Counsel for Charles E. Cardwell
Commissioner of Revenue
State of Tennessee

APPENDIX C

IN THE CHANCERY COURT FOR
DAVIDSON COUNTY, TENNESSEE

No. 88-3479-III

ITEL CONTAINERS INTERNATIONAL CORPORATION
Plaintiff

v.

CHARLES E. CARDWELL
Commissioner of Revenue
State of Tennessee
Defendant

[Filed Nov. 27, 1989]

STATEMENT OF STIPULATED FACTS

1. This is a civil action brought by Itel Containers International Corporation ("Itel") against the Commissioner of Revenue to recover the sum of $382,465.00 representing sales taxes, penalties and interest paid by Itel to the Department of Revenue ("Department") under protest on April 7, 1988. 2. The alleged sales tax deficiency was assessed upon the proceeds received by Itel from leases of its cargo containers which were used exclusively in international commerce. 3. Each of the leases was negotiated, delivered and executed outside the state of Tennessee and each of the cargo containers was delivered within the state of Tennessee to each respective lessee's trucker or a shipper for future leasing.

4. Itel is a delaware corporation, with its principal corporate office in San Francisco, California. 5. Itel's

principal business is the leasing of cargo containers for international use. 6. The particular containers whose lease proceeds were assessed by the Department for the audit period beginning January 1, 1983 through November 30, 1986 (the "Audit Period") are referred to as "Container(s)." 7. Itel's commercial domicile and principal place of business is San Francisco, California.

8. Containers are specially manufactured steel boxes, 20 or 40 feet long, 8 feet wide and 8.5 or 9.5 feet tall. 9. The containers are uniquely designed so that they may be used to transport goods by a variety of modes, including semi-trailer truck, rail car or oceangoing vessel. 10. The containers are secured to rolling stock while transported overland in international commerce. 11. Because these containers are designed to be used in a variety of transportation modes, they are uniquely suited for use in international commerce.

12. The United States is a signatory and contracting party to the Customs Convention on Containers, effective 1956 and the Customs Convention on Containers, effective 1972. 13. Attached as plaintiff's exhibits 11 and 12 are true, accurate, complete, authentic and admissible copies of the Customs Conventions on Containers, effective 1956 and 1972, one or both of which, were signed by countries in which companies leasing eighty-four percent (84%) of the containers were domiciled.

14. The United States Congress has provided in 19 U.S.C. § 1322(a) that "[v]ehicles and other instruments of international traffic, of any class specified by the Secretary of the Treasury, shall be excepted from the application of the customs laws to such extent and subject to such terms and conditions as may be prescribed in regulations or instructions of the Secretary of the Treasury." 15. The Secretary of the Treasury, through the United States Customs Service, has promulgated regulations which in accordance with the Convention, identify containers as instruments of international traffic:

> (a)(1) . . . [C]argo vans . . . in use or to be used in the shipment of merchandise in international traffic are hereby designated as "instruments of international traffic" within the meaning of Section 322(a) Tariff Act of 1930, as amended. . . . Such instruments may be released without entry or the payment of duty, subject to the provisions of this section.

19 C.F.R. § 10.41(a)(1). 16. Subparagraph (3) provides that "instruments of international traffic" includes the normal accessories and equipment imported with any such instrument which is a "container," as defined in Article 1 of the Customs Convention on Containers. 17. Article 1 of the Customs Convention on Containers defines "container" as follows:

> An article of transport equipment (life-van, movable tank or other similar structure):
>
> (i) Fully or partially enclosed to constitute a compartment intended for containing goods;
>
> (ii) Of a permanent character and accordingly strong enough to be suitable for repeated use;
>
> (iii) Specially designed to facilitate the carriage of goods, by one or more modes of transport, without intermediate reloading;
>
> (iv) Fitted with devices permitting its ready handling, particularly its transfer from one mode of transport to another;
>
> (v) So designated to be easy to fill and to empty; and
>
> (vi) Having an internal volume of one cubic metre or more and shall include the normal accessories and equipment of the container, when imported with the container; the term "container" includes neither vehicles nor conventional packing.

18. As long as the Containers are "in use or to be used in the shipment of merchandise in international traffic," they are instruments of international traffic and are not subject to the payment of import and export duties and taxes. 19. If a Container is withdrawn from its exclusive use in international commerce without the prior approval and release of the United States Government and payment of all duties and taxes, the applicant is liable for the payment of liquidated damages. 19 C.F.R. § 10.41(a)(g).

20. The Containers were all manufactured and purchased abroad by Itel and entered the United States and approved and identified by design type as instruments of international traffic. 21. Itel has posted a continuous bond with the United States Customs Service, a true, accurate, authentic and admissible copy of which is attached as plaintiff's exhibit 16, which covers all duties, taxes or liquidated damages which could be assessed for a failure to comply with government regulations regarding Itel's withdrawal of any of containers from international commerce.

22. Itel solicits container leases worldwide through its marketing offices located in San Francisco and Los Angeles, California; Houston, Texas; Chicago, Illinois; Teaneck, New Jersey; Charleston, South Carolina and Seattle, Washington. 23. No Itel leasing or marketing employees are or were located in Tennessee. 24. Itel accepts leases of its containers only in its San Francisco office. 25. As a result of its international operations, Itel allows customers to interchange containers at numerous locations around the world and in the United States. 26. Itel principally leases its containers to international shipping companies. 27. Itel leases the containers on a per diem basis. 28. While the lessee determines the containers' route of travel and to a limited extent the length of use, all container leases restrict the use of Containers

to international commerce. 29. With certain restrictions, the lessee determines where the container shall be redelivered at the close of the lease term. 30. For this reason, the inventory of containers at a particular terminal location may fluctuate widely, depending on the convenience and needs of lessees.

31. Prior to July 1, 1985, Itel did not have any employees or terminals located in Tennessee. 32. Before that time, Itel allowed its containers to be delivered and picked up at two-three "neutral" or "third party" depots located in Tennessee. 33. Effective August 1, 1985, Itel leased a tract of land and buildings located at 3126 Carrier Street, Memphis, Tennessee. 34. A terminal building and workstation were used to receive, store, deliver and in certain circumstances, repair Containers. 35. From July 1, 1985 to the close of the audit period, Itel employed four persons at the Memphis terminal. 36. These employees were responsible for the receiving, temporary storage, delivery, and in certain circumstances, repair of the Containers. 37. After July 1, 1985, Itel continued to allow customers to interchange containers at two-three neutral depots located in Tennessee. 38. Itel is registered as a dealer with the Department and collcts and remits sales and use tax to the Department on fees which it collects for repair services rendered, and some of the Containers were repaired while temporarily located in Tennessee during the audit period.

39. Itel had no employees at the three neutral or third party pool locations in Tennessee during the audit period. 40. Itel has never had any marketing office located in Tennessee. 41. There is not and has never been any Itel employee located in Tennessee for the purpose of soliciting or receiving offers for the leasing of Containers. 42. No Itel employees or representatives execute leases in Tennessee. 43. None of Itel's lessees during the audit period were Tennessee corporations, entities or individ-

uals. 44. None of the Containers were leased for use in intrastate Tennessee commerce.

45. There are three kinds of Itel lease transactions upon which the Department has collected a tax: (1) Master Interchange ("MI") leases; (2) short term leases; and (3) shipper pool arrangements. 46. Most of the Containers leased by Itel are leased under MI agreements.

47. The chief difference between MI leases and short term leases is that in the former, Itel and a prospective lessee agree to certain terms which will apply to future leases and in the latter, all of the commercial terms are determined on a case by case basis. 48. In most other respects, both kinds of leases are executed in a similar fashion. 49. Under the MI agreement, Itel and a prospective lessee agreed to certain terms which apply prospectively to future leases of Containers. 50. These terms include the price, approved locations for pickup and redelivery, minimum lease periods and the general contract terms and conditions which shall apply to all future leases. 51. Under the MI agreement, Itel "agrees to lease Containers to Lessee on an as available basis at any Itel depot in Europe and United States or any United States neutral pool location."

52. Itel receives lease commitments from prospective lessees by telephone. 53. None of the Container lessees had offices located in Tennessee and thus, none of the telephone calls were initiated from Tennessee. 54. The prospective lessee telephoned one of Itel's Intermodal Services Group, located in San Francisco, California.

56. Accordingly, a prospective lessee initially contacted either a regional marketing office or the Intermodal Services Group. 57. After determining that the container to be leased is located in a Tennessee terminal or pool, the prospective lessee would be referred to Intermodal Services for the lease commitment. 58. The Intermodal Services Group would call up a lease commitment form on the computer screen. 59. If the lessee was subject to a MI agreement, the price, redelivery locations and other terms were fixed. 60. The prospective lessee would provide the desired pickup date, equipment type and quantity. 61. In the case of a short term lease, all commercial terms would be addressed by telephone with the Intermodal Services Group. 62. Itel's marketing representative would conditionally agree to the release of the type and quantity of containers, the pickup date and provide a release number. 63. The release number would be communicated by telephone, telex or intercompany computer to Itel's delivery location. 64. At the close of the telephone conversation between the lessee and Itel's marketing representative, the lessee would be obligated to lease a particular type and quantity of container beginning from the designated pickup date under the terms and conditions set forth in the master interchange agreement or the short term lease. 65. Based upon that binding commitment, Itel would then reserve the type and quantity of containers leased at the selected location.

66. Itel provided the leased containers to the lessee's carrier or trucker on the pickup date and an Itel representative and the lessee's truck driver signed a one-page document entitled "Equipment Condition Report" ("ECR"), which acknowledged delivery of the container on the pickup date in good condition.

67. After the pickup of the Container by the carrier, Itel issued a typed lease agreement from its San Francisco offices reflecting the terms and conditions of the lease, container identification numbers, date of the lease, replacement value of the container, permitted redelivery locations, lease number, terminal of origination, date of master interchange agreement (if applicable), date of lease preparation and any additional terms and conditions.

68. Shipper pool arrangements differ from MI agreement leases and short term leases in that the shipper picked up the container prior to the acceptance of any lease commitment by a steamship company lessee. 69. A shipper signed an equipment condition report acknowledging that the container was in good condition. 70. After the container was picked up, the shipper loaded the container and transported it to an international port for transportation in international commerce. 71. Upon delivery of the loaded container to an approved ocean going steamship line, a binding lease commitment, either an MI or short lease, was made by the steamship line subject to Itel's acceptance at its San Francisco offices.

72. All Itel leases have the following provision printed in large type on the front page of the lease:

> CONTAINER(S) LEASED HEREINABOVE SHALL BE USED SOLELY IN INTERNATIONAL TRADE UNLESS IT IS SPECIFICALLY STATED BELOW TO THE CONTRARY.

73. All leases of the Containers include the above provision and none of the Container leases included terms which allow use contrary to the international trade stipulation. 74. Paragraph 7(b) of each master interchange agreement provided that "a standard Itel Lease shall be issued to and signed by Lessee for each and every container leased."

75. The standard lease agreement provided in paragraph 11(f) as follows:

> In the event Lessee has not executed Master or Long Term Agreement with Lessor covering the leasing of this equipment, this Lease shall contain the entire agreement between the parties with respect to the subject matter hereof and may be amended, modified, or changed only by an agreement in writing executed by the parties hereto. If Lessee fails, however, to give to Lessor a written objection to its

> contents within seven (7) days after this Lease is received, or if Lessee takes possession of any of the equipment provided for hereunder and retains it after receipt of this Lease then this Lease shall be effective and binding upon Lessee whether or not signed. *Notwithstanding any Master or Long Term Agreement, this Lease is subject to acceptance by Lessor at its office in San Francisco, California, and shall be deemed accepted if Lessee is not notified to the contrary within reasonable time.* If the Lease is not accepted, Lessee shall return the equipment to any of Lessor's terminals within sixty (60) days from such notification.

76. None of the Containers were dedicated to any local use during their stay in the state. 77. Itel and all Container lessees have agreed and intended that the Containers be used solely in international trade.

78. The Containers are not goods which are consumed by any lessee. 79. While the goods which may be carried in the Containers had a final destination which led to an end use in local or intrastate commerce, none of the Containers has been used in local or intrastate commerce. 80. While the Containers were temporarily in Tennessee, some of the Containers were temporarily not subject to a lease agreement. 81. Itel earns no revenue from the use of the Containers while present at its Memphis, Tennessee terminal or any of the two-three neutral depot locations located in Tennessee. 82. The interruption of movement in Tennessee was not for the purpose of any use of the Containers prior to the continuation of international movement.

83. Itel was audited by the state of Tennessee Department of Revenue, Sales and Use Tax Division, for the period of January, 1983 through November, 1986. 84. On December 31, 1986, Itel received an assessment letter from the Department, stating that additional Tennessee

sales and/or use tax was due for the above period. 85. The Department computed the tax based upon the calculation of the "average container days leased" and "average containers leased per month." 86. To calculate the "average container days leased," the total number of days that all containers leased during the test period were on lease was divided by the total number of containers leased during the test period. 87. The Department determined the "average containers leased per month" by dividing the total number of containers leased during the test period by the total number of months of the test period, or two months. 88. The Department's tax, interest and penalty assessment was based on 194.27 "average container days leased" and 65.5 "average containers leased per month" for the test period. 89. Itel paid the assessment of additional tax, penalties and interest on April 7, 1988 under protest. 90. On June 27, 1988, Itel filed a request for refund with respect to the assessment in accordance with T.C.A. § 67-1-1801. 91. The request for refund was denied on June 29, 1988. 92. Each of plaintiff's trial exhibits identified as exhibits 1-21 in the plaintiff's pretrial compliance is authentic and admissible in evidence at the trial of this action, except that the defendant does not stipulate that Exhibits 13 and 15 include documentation of all of the taxable transactions during the audit test period.

HAVE SEEN AND AGREED:

/s/ Daryl J. Brand
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
Counsel for Defendant

/s/ Philip W. Collier
PHILIP W. COLLIER, Esq.
JAMES C. SEIFFERT, Esq.
Stites & Harbison
600 West Main Street
Louisville, Kentucky 40202
(502) 587-3400
Counsel for Plaintiff

/s/ Michael D. Sontag
JAMES C. GOOCH, Esq.
MICHAEL D. SONTAG, Esq.
Bass, Berry & Sims
2700 First American Center
Nashville, Tennessee 37238
(615) 244-5370
Co-Counsel for Plaintiff

APPENDIX D

The Commerce Clause of the United States Constitution, Art. I, § 8, Cl. 3, provides in relevant part:

> Congress shall have the Power * * * To regulate commerce with foreign Nations, and among the several States.

The Import-Export Clause of the United States Constitution, Art. I, § 10, Cl. 2, provides:

> No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws.

The Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The 1972 Customs Convention on Containers, December 2, 1972, [1985] 988 U.N.T.S. 43, provides in relevant part:

PREAMBLE

The Contracting Parties,
Desiring to develop and facilitate
international carriage by container,
Have agreed as follows:

Chapter I. General

Article I. For the purposes of the present Convention:

(*a*) The term "import duties and taxes" shall mean Customs duties and all other duties, taxes, fees and other charges which are collected on, or in connexion with, the importation of goods, but not including fees and charges limited in amount to the approximate cost of services rendered;

(*b*) The term "temporary admission" shall mean temporary importation, subject to re-exportation, free of import duties and taxes and free of import prohibitions and restrictions;

(*c*) The term "container" shall mean an article of transport equipment (lift-van, movable tank or other similar structure):

(i) fully or partially enclosed to constitute a compartment intended for containing goods;

(ii) of a permanent character and accordingly strong enough to be suitable for repeated use;

(iii) specially designed to facilitate the carriage of goods, by one or more modes of transport, without intermediate reloading;

(iv) designed for ready handling, particularly when being transferred from one mode of transport to another;

(v) designed to be easy to fill and to empty; and

(vi) having an internal volume of one cubic metre or more;

the term "container" shall include the accessories and equipment of the container, appropriate for the type concerned, provided that such accessor-

ies and equipment are carried with the container. The term "container" shall not include vehicles, accessories or spare parts of vehicles, or packaging;

(*d*) The term "internal traffic" shall mean the carriage of goods loaded in the territory of a State for unloading at a place within the territory of the same State;

(*e*) The term "person" shall mean both natural and legal persons;

(*f*) The term "operator" of a container shall mean the person who, whether or not its owner, has effective control of its use.

Article 2. In order to benefit from the facilities provided for in the present Convention, containers shall be marked in the manner prescribed in annex 1.

Chapter II. Temporary Admission

(a) *Temporary admission facilities*

Article 3. 1. Subject to the conditions laid down in articles 4 to 9, each Contracting Party shall grant temporary admission to containers, whether loaded with goods or not.

2. Each Contracting Party reserves the right not to grant temporary admission to containers which have been the subject of purchase, hire-purchase, lease or a contract of a similar nature, concluded by a person resident or established in its territory.

Article 4. 1. Containers granted temporary admission shall be re-exported within three months from the date of importation. However, this period may be extended by the competent Customs authorities.

2. Containers granted temporary admission may be re-exported through any competent Customs office, even if that office is different from the one of temporary admission.

The 1956 Customs Convention on Containers, May 18, 1956, [1969] 20 U.S.T. 301, provides in relevant part:

PREAMBLE

The Contracting Parties,

Desiring to develop and to facilitate the use of containers in international traffic,

Have agreed as follows:

CHAPTER I

DEFINITIONS

Article 1

For the purposes of this Convention:

(*a*) The term "important duties and import taxes" shall mean not only Customs duties but also all duties and taxes whatsoever chargeable by reason of importation;

(*b*) The term "container" shall mean an article of transport equipment (lift-van, movable tank or other similar structure):

(i) Of a permanent character and accordingly strong enough to be suitable for repeated use;

(ii) Specially designed to facilitate the carriage of goods by one or more modes of transport, without intermediate reloading;

(iii) Fitted with devices permitting its ready handling, particularly its transfer from one mode of transport to another;

(iv) So designed as to be easy to fill and empty; and

(v) Having an internal volume of one cubic metre or more;

and shall include the normal accessories and equipment of the container, when imported with the container; the term "container" includes neither vehicles nor conventional packing;

(c) The term "persons" shall mean both natural and legal persons unless the context otherwise requires.

CHAPTER II

TEMPORARY IMPORTATION FREE OF IMPORT DUTIES AND IMPORT TAXES AND FREE OF IMPORT PROHIBITIONS AND RESTRICTIONS

Article 2

Each of the Contracting Parties shall grant temporary admission free of import duties and import taxes and free of import prohibitions and restrictions, subject to re-exportation and to the other conditions laid down in articles 3 to 6 below, to containers when they are imported loaded to be re-exported either empty or loaded, or imported empty to be re-exported loaded. Each Contracting Party shall retain the right to withhold these facilities in the case of containers which are imported on purchase or otherwise taken into effective possession and control by a person resident or established in its territory; the same applies to containers imported from a country which does not apply the provisions of this Convention.

Article 3

Containers temporarily imported free of import duties and import taxes shall be re-exported within three months from the date of importation. This

period may be extended for valid reasons by the Customs authorities within the limits laid down by the legislation in force in the territory into which containers have been temporarily imported.

19 U.S.C. 1322(a) provides:

Vehicles and other instruments of international traffic, or any class specified by the Secretary of the Treasury, shall be excepted from the application of the customs laws to such extent and subject to such terms and conditions as may be prescribed in regulations or instructions of the Secretary of the Treasury. The authority delegated to the Secretary by this subsection shall not extend to communications satellites and components and parts thereof.

19 C.F.R. 10.41a provides in relevant part:

(a)(1) Lift vans, cargo vans, shipping tanks, skids, pallets, caul boards, and cores for textile fabrics, arriving (whether loaded or empty) in use or to be used in the shipment of merchandise in international traffic are hereby designated as "instruments of international traffic" within the meaning of Section 322(a), Tariff Act of 1930, as amended. The Commissioner of Customs is authorized to designate as instruments of international traffic, in decisions to be published in the weekly Customs Bulletin, such additional articles or classes of articles as he shall find should be so designated. Such instruments may be released without entry or the payment of duty, subject to the provisions of this section.

* * * *

(a)(3) As used in this section, "instrumentalities of international traffic" includes the normal accessories and equipment imported with any such instrument which is a "container" as defined in Article 1 of the Customs Convention on Containers.

* * * *

(g) For failure promptly to report the diversion or withdrawal or promptly to make the required entry and pay the duties due, the applicant shall be liable for the payment of liquidated damages equal to the domestic value of the instrument established in accordance with Section 606, Tariff Act of 1930.

19 C.F.R. 115.1 provides:

This chapter establishes procedures for certifying containers and road vehicles in conformance with the Customs Convention on Containers (1956) (TIAS-6634), the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets (1959) (TIAS 6633), the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets, November 14, 1975 (TIAS), and the Customs Convention on Containers, 1972 (TIAS), by applying the procedures and technical conditions set forth in the annexes to these conventions.

Tenn. Code Ann. 67-6-102(23)(A) (1989) provides in relevant part:

"Sale" means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional, or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration * * *.